(28,571)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 616.

JOHN HILL, JR., REUBEN G. CHANDLER, ADOLPH KEMPNER, ET AL., APPELLANTS,

vs.

HENRY C. WALLACE, SECRETARY OF AGRICULTURE; DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE OF THE UNITED STATES, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1921.

I Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, Begun and Held at the United States Court Room, in the City of Chicago, in said District and Division, Before the Honorable Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, on Monday, the Seventh Day of November, in the Year of Our Lord One Thousand Nine Hundred and 21, Being One of the Days of the Regular November Term of Said Court, Begun Monday, the Seventh Day of November, and of Our Independence the 146th Year.

Present:

Honorable Kenesaw M. Landis, District Judge.
John J. Bradley, U. S. Marshal.
John H. R. Jamar, Clerk.

II In the District Court of the United States, Northern District of Illinois, Eastern Division.

No. 2400.

JOHN HILL, JR., et al., Plaintiffs,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Be it remembered that heretofore, to-wit: on the 25th day of October, 1921, came the above named complainants, by their solicitors, and filed their bill of complaint, as follows:

1 Filed Oct. 25, 1921. John H. R. Jamar, Clerk.

In the District Court of the United States, Northern District of Illinois, Eastern Division.

2400.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Bill Attacking the Constitutionality of the Future Trading Act.

Robbins, Townley & Wild,
Solicitors for Complainants.
Henry S. Robbins,
Counsel.

1—616

1a In the District Court of the United States, Northern Distri
of Illinois, Eastern Division.

2400.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Bill Attacking the Constitutionality of the Future Trading Ac

To the Honorable the Judges of said Court, in Chancery Sitting:

Your orators, John Hill, Jr., Reuben G. Chandler, Adolph Kemp
ner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edwar
L. Glaser, and Alonzo B. Lord, bring this, their bill of complaint i
their own behalf (and in behalf of all other members of the Boar
of Trade of the City of Chicago, who may wish to join therein
share in the relief granted herein), against Henry C. Wallace, Se
retary of Agriculture; David H. Blair, Commissioner of Interna
Revenue of the United States; Charles F. Clyne, United States Di
trict Attorney for the Northern District of Illinois; John C. Cannon
Collector of Internal Revenue for the First District of Illinois
Board of Trade of the City of Chicago, Joseph P. Griffin
2 president and a director of said Board of Trade, and James
Fones and Theodore E. Cunningham, vice-presidents an
directors of said Board of Trade, and Louis C. Brosseau, John
Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards
Joseph Simons, William E. Hudson, Edward D. McDougal, Edwi
A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey
Allan M. Clement, Fred S. Lewis and James C. Murray, director
of said Board of Trade, and John R. Mauff, secretary of said Boar
of Trade, and allege:

1. That the Board of Trade of the City of Chicago (hereinafte
called the Board) is a corporation organized under a special charte
granted by the State of Illinois, February 18, 1859, by which certai
persons before that date residing in the City of Chicago and engage
there in the purchase and sale of grain were created a corporation
and were given power to admit such persons as members and expe
such members as said corporation might see fit, and also power t
adopt and maintain such rules, regulations and by-laws as said cor
poration might think proper for the government of said corporation
and for the management of the business of its members and the
mode in which it should be transacted; and said corporation wa
also authorized to appoint committees of arbitration for the settle
ment of such matters of difference as might be submitted by mem
bers of said Board or others; and said charter also provided that any
award in such arbitration, when filed in any Circuit Court of said
state, should have the force and effect of a judgment, upon which

an execution might issue as upon other judgments; and by said charter said corporation was also given power to appoint such persons as they may see fit to examine, measure, weigh, gauge, or inspect flour, grain and other articles of produce or traffic
3 commonly dealt in by the members of said corporation, and the certificate of such appointee as to quality or quantity of any such article, or its brand or mark was made evidence between any buyer and seller assenting to the employment of such appointee; and said corporation was also given power to do or carry on any business that is usual in the management of boards of trade or chambers of commerce, a copy of which charter is hereto attached and made a part hereof as Exhibit "A."

2. That upon the granting of said charter said grantees of said charter adopted and declared the objects of said Board to be:

"To maintain a Commercial Exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and to disseminate valuable commercial and economic information; and, generally, to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits,"

and to accomplish these objects the members of said Board adopted, and for many years maintained, and now have, certain regulations governing the inspection of flour, grain provisions, hay, the cutting and packing of hog products, the grading and inspection of flaxseed, the regulation of grain warehouses, whose receipts shall be made regular for delivery on grain contracts, the sampling of grain, the storage of provisions, the management of a clearing house maintained by said Board for the convenience of its members, the weighing of grain, the maintenance of a Custodian Department respecting commodities dealt in, the distribution of market records and reports, and other like matters. And the Board has also, for many years adopted and maintained, and now maintains, a set of rules which provide for the admission and expulsion of members and govern the relations of its said members to said Board and to
4 each other, and also the manner in which the business of its members should be transacted, which rules also vest (subject to said rules) the government of said Board and the management of its business and financial concerns in a board of eighteen directors, one of whom shall be president and two of whom shall be vice-presidents of said Board, (the individuals above named being at present its officers and directors); and said rules further provide that said board of directors should annually assess against each of it members an amount, which in the aggregate should be sufficient to meet all the expenditures of said Board. And certain of its said rules which are material in this controversy are set out in Exhibit "B" attached to this bill and made a part thereof.

3. That among the rules so adopted and now in force are some providing that, whenever any member should default on a business

contract or on the payment of any award made in any arbitration, or should be guilty of certain other misconduct, he should be suspended by the board of directors from all the privileges of membership, and that in case any member shall be guilty of certain other graver offenses, such as bad faith, or an attempt at extortion or other dishonest conduct, he shall be expelled from the Board; but that before any such suspension or expulsion written charges shall be filed with the board of directors specifying the offense charged, of which the member shall have notice and a hearing before such suspension or expulsion; and that one of said rules (see Section 1, Rule X in Exhibit B) provides that any male person of good character and credit may be admitted to membership by the board of directors upon payment of an initiation fee of twenty-five thousand dollars, or on presentation of an unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the Rules, Regulations and By-laws of the
5 Association, and all amendments that may be made thereto, which agreement is signed by all members and reads as follows:

"We, the undersigned members of the Board of Trade of the City of Chicago, do, by our respective signatures and by virtue of our membership in said corporation, hereby mutually agree and covenant with each other and with the said corporation, that we will, in our actions and dealings with each other and with the said corporation, be in all respects governed by and respect the rules, regulations and by-laws of the said corporation as they now exist, or as they may be hereafter modified, altered or amended."

That said Board does not admit, and never has admitted, to membership any corporation; but one of its said rules provides that, if any two members of said Board are executive officers and bona fide and substantial stockholders of any corporation, it may become a party to any trade or contract made by it in any of the commodities bought and sold on the exchange of said Board, but that in that event said two members shall be subject to be disciplined for any default in the execution of any such trade or contract of said corporation in the same manner as they are subject to be disciplined for failure to comply with the terms of any business obligation of their own; and that said Board now has 1,610 members, and that all of your orators are members in good standing of said Board.

4. That yearly since 1859 said Board has levied an assessment upon all its members sufficient, with the moneys received from its other incidental sources of revenue, to meet all its ordinary expenses and with the surplus of its said revenue it has acquired, and now owns, in fee real estate in the business district of Chicago, upon which it has constructed a large building,
6 which provides it with an exchange room and offices and also surplus space, from which said Board derives a substantial rental; and that the fair market value of such real estate and building, over and above a mortgage thereon, exceeds $2,000,000,

and that said Board now raises each year by assessments upon its members as aforesaid, more than $240,000 for the purpose of maintaining said building and its said exchange.

5. That the Board does not enter, and never has entered, into any commercial transactions of any kind whatever for profit, nor does it pay, or seek to pay, any dividends to its members; that its chief purpose and function is to provide an exchange room where its members may meet daily between certain market hours and make with each other contracts for the purchase and sale of grain and other products of the farm, and also to prescribe, and enforce, rules respecting the terms of such contracts and to enforce, by disciplinary proceedings when necessary, compliance by its members with their said contracts, and for the settlement of disputes arising between its members out of their trades, and about the only other function of said Board is to determine, who are fit persons, as respect character and financial responsibility, to be and remain its members.

That as its main source of revenue is, and always has been, the annual dues paid by its members, it is incumbent upon the said Board to make it profitable for persons to become and remain members and pay such yearly assessments; and that, in order to render its disciplinary power over its members sufficiently effective to maintain a high character for business probity among its members, it is also necessary for said Board, not only to make it profitable for members to remain such, but also to give a substantial salable value to such memberships; and that said Board seeks to accomplish and accomplishes this by

7 (1) limiting the number of its members as aforesaid;

(2) providing that only members may make transactions in its exchange room;

(3) prescribing, and compelling all its members to conform to, certain fixed reasonable minimum rates of commission, which members, when acting as agents, must charge their principals for making transactions on said exchange;

and that for this purpose said Board has for many years maintained (as do all commercial exchanges), and still maintains and enforces, a rule prescribing the minimum rates of commission (which are reasonable) as respects each of the different kinds of transactions, each member is required to charge, whenever acting for a principal in any transaction upon its exchange, but the rate to members is lower than the rate to non-members, and that one of the essential features of this rule is the following provision:

"Rule XIV. * * * F. Any member who, or whose firm or corporation, shall be convicted by the Board of Directors of a violation of the provisions of this rule, or of any evasion thereof by making rebates in prices, by making any contract or observing any contract already made, by furnishing a membership in this Ex-

change, by giving any bonus, gift, donation, or otherwise, or shall purchase or offer to purchase any grain, seeds, provisions or other commodities consigned to him, them, or it, for sale, or by rendering any other service or concession whatsoever, with the intent to evade in any way directly or indirectly the regular rates of commission or brokerage established by this rule, shall be expelled from this Association."

That the provision for the expulsion of any member violating its said commission rule was first inserted in said rule about the year 1900 and that before such insertion the salable value of its memberships did not exceed $800, and that since such amend-
8 ment and its strict enforcement by said Board, memberships have been sold to persons desiring to become members for as much as $11,000 and are now saleable for more than $7,000.

6. That in recent years there have been organized in most of the grain-producing states many so-called farmers' co-operative societies, associations or corporations and farmers' co-operative elevator companies, with the avowed purpose of enabling such farmers as should become members thereof to market their crops at actual cost, and, if possible, to market their crops through the exchanges at actual cost, and without paying the commissions charged by members of such exchange, the method contemplated to attain this being to make one of the salaried officers of said co-operative organization a member of the exchange, and through him to sell all the grain produced by members of the co-operative association—he temporarily charging the prescribed commissions—and ultimately rebating back to the members of such organization the aggregate of such commissions (after paying his salary and incidental expense) on the basis of the number of bushels of grain each producer has sold through said organization—such rebates being popularly called "Patronage dividends;" and that at least one of the states (Nebraska) has passed a statute providing that cooperative organizations may be organized with the power to distribute their earnings to their members upon the basis of, or in the proportion to the quantity of grain which each member has sold through said co-operative organization; and that on April 18, 1921, there was organized under the laws of Delaware a corporation known as "U. S. Grain Growers, Inc.," membership in which is limited to producers of grain; and the promoters of said corporation publicly state the general purpose of said corporation is the creation of a non-stock, non-profit agricultural organization,
9 which can market at cost grain produced by its members, and which extends the so-called farmers' co-operative movement farther than co-operative methods have thus far gone.

That the by-laws of such corporation provide for the organization of subsidiary corporations for the carrying out of said purposes, and that the operation of said corporation shall consist of the marketing of the grain of its members, by virtue of contracts with state-wide or interstate growers' associations, farmers' co-operative elevator companies or with local co-operative associations; and that said U. S. Grain Growers, Inc., are tendering large numbers of producers

of grain throughout the United States a contract between the individual producer and his local co-operative company, and is also seeking the execution by all local co-operative elevator companies of contracts with said U. S. Grain Growers, Inc., the purpose and object sought to be accomplished through said two contracts being that the grain of all growers of grain who sign such contracts with any local elevator company shall, through the co-operation of said local elevator company and said U. S. Grain Growers, Inc., be sold at actual cost, and without the payment of any commissions to members of any of the grain exchanges of the country; and your orators are informed and believe that very many producers and co-operative elevator companies have already signed and delivered to said U. S. Grain Growers, Inc., such contracts, copies of which two contracts are annexed to this bill and made a part thereof as Exhibit "C."

That heretofore members of said co-operative associations have sought to become members of said Board, but said Board has refused to admit any such persons to membership, for the reason that the avowed purpose of such applicants has been to rebate back to the members of their organization the aggregate amount of their commissions, less their salary and expenses, and that this would violate and break down said commission rule of said Board, and would ultimately destroy the business of its members, which consist in the receiving of grain by consignment for sale on commission, the ultimate effect of which would be to much impair, if not destroy, the value of the memberships of said Board, and make it difficult for said Board to maintain sufficient members who would be willing to pay assessments to meet the expenses of maintaining its said exchange.

7. That the members of said Board engage only in the following different kinds of trading in grain:

(1) Many of them, including some of your orators, act as commission merchants and receive from producers and country grain dealers grain in cars and boats consigned to them, which, as agents, they sell for immediate delivery, and they account to their principals for the proceeds of such sales less their commissions and other expenses; and many of said members, including some of your orators, acting either as agents or principals, purchase and sell grain in Chicago, which is in cars or elevators, for immediate delivery, all of such transactions being popularly known as "cash" trades.

(2) Many members of said Board, including some of your orators, send out in the afternoons, whenever the market conditions are favorable, telegrams and letters to country grain dealers and others non-resident in Chicago, offering to buy grain at a certain named price and to be shipped within a certain named time, if the offer shall be accepted by telegram received by the offering member before the opening of the Board's exchange next morning, such transaction being known to the trade as "contracts to arrive" or "cash sales

for deferred shipment"; many members, including some of
11 your orators, also send out, when market conditions are favorable, telegrams and letters to millers an others (non-residents in Chicago) on the consumer's side of the market offering to sell grain at a named price and subject to shipment within a named time, if such offers are accepted within a certain time, transactions of this kind being also known to the trade as "cash sales for deferred shipment."

(3) Another kind of future trading engaged in by some of the members of said Board of Trade prior to October 1, 1921, was the making of trades known as "privileges," "offers," "puts and calls," "indemnities," or "ups and downs," which are unilateral contracts, in which a member of said Board pays to another member a small sum ($500 for every five thousand bushels of grain involved) for the privilege of calling on the member receiving such consideration to deliver to the paying member at a future date a specified quantity of grain of a grade deliverable upon future contracts of said Board, or in which a member pays such consideration for the privilege of delivering to the member receiving such compensation on a specified future date a certain number of bushels of said grain, the paying member having the option to deliver or receive, but not being obliged to do so; and when the course of the market makes it profitable for him to exercise his said option he performs said contract either by making with the other member a bi-lateral contract for future delivery (such as is hereinafter described) for the quantity and at the price named in optional contract, or by the delivery or receipt of warehouse receipts of a regular warehouse of the character hereinafter described.

(4) Many members of said Board, including some of your orators, daily engage either as principals or as agents, in the making upon said exchange, of contracts with other members of the Board
12 for the purchase and sale of grain for future delivery, said contracts providing that the seller therein shall deliver in Chicago, the grain covered by the contract upon any day of the named month that he shall select. Such contracts relate almost wholly to wheat, corn and oats, and the volume of such trading is so large, that said Board has set aside in its exchange room three separate spaces, upon each of which it has constructed a circular raised platform, commonly known as a "pit," where its members may conveniently, and do daily, gather and make such contracts with each other by open vive voce bidding; and respecting such trading the rules of said Board have for many years required, and now require, that all orders received by members to buy or sell for future delivery must be executed in the open market upon its exchange room and only during the hours of regular trading; and said rules also provide that no trade or contract for future delivery shall be made or offered to be made by any member of said Board, except between 9:30 a. m. and 1:15 p. m., except on Saturday, when the trading must close at 12 o'clock M., it being the object and intent of said rule that all such trading which shall tend to the maintenance of a public market shall be confined

within the hours above specified; by reason whereof all such trading in grain for future delivery by members of said Board is in fact confined to said Exchange room and said market hours; and both buyers and sellers in all said contracts are personally present in the City of Chicago when the contracts are made; and another rule of said Board requires that any offer to buy or sell for future delivery when made openly in the exchange room during the hours for regular trading, may be accepted by any other member of said Board, and that the contract shall be made with the member first accepting said offer.

8. That all such contracts for future delivery contemplate and provide for the delivery of warehouse receipts instead of the grain, and only of such warehouse receipts as the rules of said Board make valid for delivery; that a rule of said Board now and for many years in force (see Rule XXI of Exhibit B), provides that only such warehouse receipts shall be deliverable upon contracts for future delivery as shall be issued by warehouses which have complied with the rules, regulations and requirements of said Board, and have been by the Board of Directors declared regular warehouses for the storage of grain; and none of the warehouses thus made regular are located outside of the State of Illinois; and said rules also make it the duty of the Board of Directors on the first of July in each year to designate the grain elevators or warehouses in Illinois whose receipt shall be deliverable between its members on their contracts for future delivery for the ensuing year; but said rule also provides that said Board of Directors may declare, as regular elevators, only such elevators or warehouses as have been licensed by the State of Illinois to conduct a public warehouse, pursuant to the provisions of a statute of that state entitled, "An Act to regulate public warehouses and the warehousing and inspection of grain and to give effect to Article XIII of the Constitution of this state," which said Act provides that it shall be the duty of every warehouseman of Class "A" to receive for storage any grain tendered him and to mix such grain with other grain of a similar grade received at the same time as near as may be, and such statute further provides that the warehouse receipt issued for such grain so received into said warehouse shall state on its face that the grain mentioned therein has been received into store, to be stored with other grain of the same grade received about the same time as the date of said receipt; and by said Act it is further provided that, when any holder of any such warehouse receipt shall demand the delivery of the grain therein mentioned, said proprietor shall deliver on said receipt such of the grain of that particular grade as was first received by him in store or which had been the longest time in store in his warehouse; and, while said statute provides that, with the consent of any depositor of grain and the proprietor of a warehouse, the particular grain of said depositor may be kept in a bin by itself, apart from that of other owners, and that such bin shall be marked and known as a "separate bin," and that the receipt therefor, shall so state and contain the number of such special bin, grain in Chicago is seldom, if ever, stored in a public warehouse of Class "A" in a special bin, and if so stored the ware-

house receipts issued for such grain are not, and never have been, deliverable upon said contracts of future delivery made by members of said Board; nor has said Board ever declared a regular elevator under said rule any warehause which has not been licensed under said statute to conduct a warehouse of Class "A."

9. That at the present time there are twelve warehouses, with an aggregate capacity of 12,950,000 bushels, whose proprietors have received under said statute, licenses to conduct Class "A" warehouses, and which have been declared regular by the Board under said Rule XXI, for the year ending July 1, 1922. That the space of each of said warehouses is subdivided into numerous partitions or bins, the capacity of said bins ranging from 2,000 bushels to 7,000 bushels; and that almost all grain is received in Chicago upon cars, whose capacity is from 1,500 to 2,000 bushels, and whenever a carload of grain is unloaded into any of said elevators of Class A, it is immediately carried into one of said bins and is there at once mixed with other grain of like grade already stored in such bin, and thus any individual carload of grain immediately loses its identity upon being received in such warehouse; and when the person, to whom the warehouse receipt is issued for such carload of grain, or his assignee, tenders said warehouse receipt to said warehouseman for the purpose of having the grain therein specified delivered to him, he never gets the identical grain delivered to such warehouse when it issued said receipt.

10. That in this trading for future delivery on the exchange of said Board during any year many millions of bushels of wheat, corn and oats are bought and sold for future delivery, and as respects at least three-quarters of the grain covered thereby, said contracts are fulfilled or settled without delivery of any warehouse receipts, but are settled through a system of offsetting purchases with sales and the payment of differences in the market prices under a system commonly known as the "ringing" system which is provided for by the rules of said Board; and that practically all said remaining future contracts are performed or completed during the month specified for delivery by the delivery by buyers to sellers of warehouse receipts of public warehouses of Class "A" which warehouses have been made regular under the said rules of said Board.

That while said Rule XXI makes grain in cars deliverable on future contracts during the last three days of the delivery month mentioned in said contract, where receipts are issued by the carrier, it is also provided by said rule that said delivery shall not be complete, and that bills for said grain so tendered shall not be payable, until said grain shall have been unloaded into an elevator which has theretofore been made regular for delivery by said Board of Directors, and elevator receipts covering said grain shall have been delivered to the buyer; and that the amount of grain in carload lots actually delivered under the provisions of this rule on contracts for future delivery is much less than 1 per cent of the total volume of said trading for future delivery and even

a very small percentage of the total quantity of grain actually delievered upon said contracts; and that, while said rule also authorizes said Board of Directors, when an emergency exists, to provide that grain in cars may be tendered during any business day of the month specified in the contract for future delivery, said rule also provides that such tender shall not be deemed a complete delivery until such grain shall have been unloaded into an elevator made regular by said Board and the warehouse receipt therefor shall have been delivered to the buyer; and while said Rule XXI also authorizes said Board of Directors, when an emergency exists requiring more storage room than can be supplied by the regular elevators, to make other places suitable for the storage of grain regular for storage of grain deliverable under the rules of the Board, said Board has seldom, if ever, been able to induce proprietors of places otherwise suitable for the storage of grain to qualify under the Warehouse Statute of the State of Illinois for the short period of time during which any such emergency exists, and that the quantity of storage room in Class "A" warehouses declared regular by said Board of Trade is such that an emergency, such as is contemplated in said rule, rarely occurs in Chicago, and then lasts for only a short period of time, and that at the present time said Board of Directors of said Board have not exercised said emergency powers conferred upon them, and the only grain now deliverable on said future contracts is grain for which warehouse receipts have been issued by said regular elevators, and carloads of grain tendered during the last three days of the delivery month followed by delivery of warehouse receipts when such grain is unloaded into a regular elevator.

17 11. That a large part of the total volume of trading for future delivery upon the exchange of said Board above described consists of contracts made by grain merchants, millers and others, who make such contracts only for the purpose of insuring themselves against price fluctuations respecting other grain owned by them for the purpose of merchandizing or shipping to other consuming markets or to manufacture into flour, and that in most cases such contracts for future delivery are fulfilled, not by the delivery of the grain but by the making of counter-contracts to offset against the ones originally made; that another large part of the volume of said future trading on the exchange of said Board consists of contracts made by or for so-called speculators, being persons who have capital and make a study of trade conditions affecting prices and endeavor to forecast the future prices of grain and to profit thereby through the making of said contracts for future delivery.

That there is produced yearly in the United States more wheat, corn and oats than is consumed within said United States; that from the year 1899, to the year 1913, both inclusive, the number of barrels of wheat-flour exported in any year, as disclosed by the statistics of the United States Department of Commerce, was not less than 8,826,000 barrels, and in one of said years the number of barrels exported was 19,716,000; and that during one of said years

there was exported 154,856,000 bushels of wheat, and except in one of said years (when there was a failure of the crops), there has been not one of said years in which the amount of wheat exported did not exceed 23,000,000 bushels; and that during one of said years there was exported over 209,000,000 bushels of corn, and in none of said years was there exported less than 26,000,000 bushels of corn and that yearly exports of oats during said years range from over 46,000,000 bushels to 1,000,000 bushels.

18 That in order to enable its members and their customers to have all obtainable knowledge when making their said contracts for future delivery, said Board gathers from all parts of the world such data and other information respecting the conditions of growing crops, the amounts of grain on hand in different countries, etc., as it can obtain—incurring a large expense therein—and makes such information available to all its members, and through them to their customers; and said Board also collects and sanctions the distribution of its own continuous quotations of prices made in its said "pits".

That other commercial exchanges which furnish to their members and their customers like facilities for making contracts for future delivery, are located and maintained at Minneapolis, Duluth, Omaha, Kansas City and St. Louis; that the members of all of such exchanges are competing with the members of said Board and these other exchanges, for the business of making contracts for future delivery for customers and the purchase of cash grain at country points; and many of the members of said Board are also members of some or all of said other exchanges, and they trade in said other exchanges for future delivery when price conditions there, as compared with price conditions on said Board, make it profitable for them to do so; and that the facts above stated, as well as the present supply of available grain and the present and future requirements of the millers and consumers, not only in this country but in different countries of Europe, constitute the elements, which determine from time to time the prices, at which said future trading on said Board is transacted; and that no member of said Board has ever been indicted or convicted, under either the law of the State of Illinois or the federal statute, for running a "corner" on said Board.

19 12. That during the years from 1884 to 1913, both inclusive, wheat of the grade contemplated in the contracts for future delivery on the said Board sold as low as 48⅞ cents per bushel and never more than two dollars per bushel, and during most of said time the price of said wheat was below $1.00 per bushel; and that during the same years corn of the kind and grade deliverable upon said future contracts sold as low as 19¼ cents per bushel and never higher than one dollar per bushel, and for most of said time sold below 60 cents per bushel, and that during said years the price of oats of the quality and grade deliverable upon said future contracts sold as low as 14¾ cents per bushel and never sold higher than 62½ cents per bushel and for much the greater part of said period sold

under 40 cents per bushel; and that at the present time contract wheat is selling for about $1.05 per bushel, contract corn about 46 cents a bushel and contract oats at about 31 cents a bushel; and that no member of said Board can afford to make contracts for future delivery and pay the tax thereon imposed by The Future Trading Act and said law in fact prohibits all those who are not members of a board of trade, which has been designated by the Secretary of Agriculture a contract market under said Act, from making any contracts for future delivery respecting grain.

13. Your orators are advised by their counsel and charge that said Future Trading Act violates the Constitution of the United States in the following, as well as in other, respects:

(1) It seeks to deprive your orators and other members of said Board of their property without due process of law contrary to the 5th amendment of said Constitution, in that the compulsory admission to membership on said Board of representatives of co-operative associations of producers as required in clause (E) of Section 5 will impair the value of all memberships in said Board.

20 (2) It violates Section VIII of Article I, and the 10th Amendment of said Constitution, in that it attempts to regulate commerce, which is not commerce with foreign governments or among several states or with the Indian tribes, but is commerce wholly between persons contracting within the State of Illinois respecting the purchase or sale of grain which forms a part of the common property of that state—in that, in other words, it seeks to regulate commerce which is not interstate but purely intrastate in character.

(3) It violates the 10th amendment to the said Constitution in that it interferes with the right of the State of Illinois to provide for and regulate the maintenance of a grain exchange within its borders upon which is conducted the making of contracts which are merely intrastate transactions.

(4) It violates the 5th amendment to the Constitution in that it gives to farmers' co-operative associations and their representatives the right to share in and enjoy the use of real estate owned by the Board (a private corporation) and used for the exclusive use and benefit of its members, and this without giving the Board or its members any compensation therefor.

(5) It violates the 5th amendment to said Constitution, in that it attempts to take the private property of the Board and its members for public use without just compensation to such owners.

(6) It violates Section 8 of Article I, and the tenth amendment of said Constitution, in that the taxes imposed by said Act are not laid either to pay the debts, or provide for the common defense or general welfare of the United States, but for the purpose only of regulating grain exchanges as respect intrastate transactions of their

members and of benefiting a class (producers of grain) at
21 the expense of another class (members of grain exchanges).

(7) It violates the 4th amendment to said Constitution in that it authorizes unreasonable searches by the Secretary of Agriculture respecting books and papers which do not relate to any property upon which a tax is imposed, nor to any transaction within the commerce power of Congress.

(8) It violates the 5th amendment to said Constitution in that it deprives members of said Board and of other grain exchanges of the right to contract for the purchase of grain for future delivery as fully as other owners and growers of grain and of land on which the grain is grown, and associations of such growers are permitted by the law to contract.

14. That your orators did, on the 18th day of October, 1921, request the board of directors of said Board to cause said Board to institute a suit to have such "Future Trading Act" adjudged unconstitutional before complying therewith, but said board of directors has refused to comply with said request, and state that they intend to comply with the provisions of said Act and that your orators are informed and believe that said Board of Directors refused said request because they fear to antagonize the public officials whose duty it is to construe and enforce said Act and that your orators fear that, acting under the coercion imposed upon them by said Act, said Board of Directors will admit to membership in said Board authorized representatives of co-operative associations of producers in order to comply with sub-clause (*a*) of Section 5 of said Act, and will apply to said Secretary of Agriculture to designate such Board as a contract market under said Act, and will do all acts necessary to entitle said Board to be designated as a contract market, unless said
22 directors and said Board shall be enjoined by this court from so doing; and that such action by said Board of Directors will cause irreparable injury to your orators and other members of said Board; that there is no collusion between your orators and any of said Board of Directors to confer on a court of the United States jurisdiction of a cause of which, it would not otherwise have jurisdiction; and that as respects each of your orators, the amount involved and the matters in dispute in this suit, exclusive of interest and costs, is more than $3,000.

15. Forasmuch, therefore, as your orators are remediless in the premises except in a court of equity, and to the end that said Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue for the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters,

Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, as directors of said Board, and John R. Mauff, as its Secretary, may be required to make direct, true and complete answer to this bill, but not under oath (answers under oath being hereby waived); that each and every provision of said Future Trading Act be adjudged to violate the Constitution of the United States and to be void, and that a temporary injunction may immediately issue and upon final hearing, be made permanent; (1) enjoining said Henry C. Wallace, as Secretary of Agriculture,
23 from taking any steps whatever, legal or otherwise, to induce or compel said Board of Trade or its directors to comply with sub-clause (*e*) of Section 5 of said Future Trading Act or to be designated a contract market under said Act, or to compel said Board or any of its members to comply with any of the provisions of said Act, and also enjoining said Wallace from requiring said Board or any of its members to make any report or keep any record relating to any contracts for future delivery made upon the exchange of said Board, and from taking any other steps or do- any other act authorized or required by such Future Trading Act as respects said Board or its members; (2) also enjoining and restraining and David H. Blair as Commissioner of Internal Revenue for the United States, John C. Cannon as Collector of Internal Revenue for the First District of Illinois and Charles F. Clyne, District Attorney of the United States for the Northern District of Illinois, from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty, or fine, mentioned in, or imposed by said Act, from any member of said Board; (3) and also enjoining said Board, and each of its said officers and directors, from applying to said Secretary of Agriculture to have said Board designated as a "contract market" under said Act, and from admitting to membership in said Board any representative of any co-operative association of producers in compliance with, or under the terms specified in sub-clause (*e*) of Section 5 of said Act, or from taking any other steps for the purpose or with the intent to comply with the said Act; and that your orators may have such other and further relief as to your Honors shall seem meet.

16. May it please your Honors to grant unto your orators a preliminary and permanent injunction against said defendants
24 as above prayed, and also a writ of subpœna of the United States directed to said Harry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, president and a director of said Board of Trade, and James J. Fones and Theodore E. Cunningham, vice-presidents and directors of said Board of Trade, and Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward T. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M.

Clement, Fred S. Lewis and James C. Murray, directors of said Board of Trade, and John R. Mauff, secretary of said Board of Trade commanding them on a day certain to appear and answer this bill, and to abide by and perform such decree as may be entered by this court.

ROBBINS, TOWNLEY & WILD,
Solicitors for Complainants.

HENRY S. ROBBINS,
Counsel.

25 STATE OF ILLINOIS,
County of Cook, ss:

John Hill, Jr., being duly sworn, says that he is one of the complainants in the foregoing bill, and that he has read said bill and knows the contents thereof, and that all the allegations of said bill are true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

JOHN HILL, JR.

Subscribed and sworn to before me, a notary public in and for said county and state, this 25th day of October, A. D. 1921.

OLIVE M. BUGGIE, [SEAL.]
Notary Public.

26 EXHIBIT A.

Charter of Chicago Board of Trade.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. That the persons now composing the Board of Trade of the City of Chicago, are hereby created a body politic and corporate, under the name and style of the "Board of Trade of the City of Chicago," and by that name may sue and be sued, implead and be impleaded, receive and hold property and effects, real and personal, by gift, devise or purchase, and dispose of the same by sale, lease, or otherwise (said property so held not to exceed at any time the sum of two hundred thousand dollars); may have a common seal, and alter the same from time to time; and make such Rules, Regulations and By-Laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land.

Sec. 2. That the Rules, Regulations and By-Laws of the said existing Board of Trade shall be the rules and By-Laws of the corporation hereby created, until the same shall be regularly repealed or altered; and that the present officers of said Association, known as the "Board of Trade of the City of Chicago," shall be the officers of the corporation hereby created, until their respective offices shall

regularly expire or be vacated, or until the election of new officers according to the provisions hereof.

Sec. 3. The officers shall consist of a President, one or more Vice-Presidents, and such other officers as may be determined
27 upon by the Rules, Regulations, or By-Laws of said corporation. All of said officers shall respectively hold their offices for the length of time fixed upon by the Rules and Regulations of said corporation hereby created, and until their successors are elected and qualified.

Sec. 4. The said corporation is hereby authorized to establish such Rules, Regulations and By-Laws for the management of their business, and the mode in which it shall be transacted, as they may think proper.

Sec. 5. The time and manner of holding elections and making appointments of such officers as are not elected, shall be established by the Rules, Regulations and By-Laws of said corporation.

Sec. 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the Rules, Regulations and By-Laws thereof.

Sec. 7. Said corporation may constitute and appoint Committees of Reference and Arbitration, and Committees of Appeals, who shall be governed by such rules and regulations as may be prescribed in the Rules, Regulations or By-Laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the Association, or by other persons not members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpœnas and attachments, compelling the attendance of witnesses, the same as justices of the peace, and in like manner directed to any constable to execute.

Sec. 8. When any submission shall have been made in writing, and a final award shall have been rendered, and no appeal taken within the time fixed by the Rules or By-Laws, then, on
28 filing such award and submission with the Clerk of the Circuit Court, an execution may issue upon such award as if it were a judgment rendered in the Circuit Court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court.

Sec. 9. It shall be lawful for said corporation, when they shall think proper, to receive and require of and from their officers, whether elected or appointed, good and sufficient bonds for the faithful discharge of their duties and trusts; and the President or Secretary is hereby authorized to administer such oaths of office as may be prescribed in the By-Laws or Rules of said corporation. Said bonds shall be made payable and conditioned as prescribed by the Rules or By-Laws of said corporation, and may be sued and the

moneys collected and held for the use of the party injured, or such other use as may be determined upon by said corporation.

Sec. 10. Said corporation shall have power to appoint one or more persons, as they may see fit, to examine, measure, weigh, gauge, or inspect flour, grain, provisions, liquor, lumber, or any other articles of produce or traffic commonly dealt in by the members of said corporation; and the certificate of such person or inspector as to the quality or quantity of any such article, or their brand or mark upon it, or upon any package containing such article, shall be evidence between buyer and seller of the quantity, grade or quality of the same, and shall be binding upon the members of said corporation, or others interested, and requiring or assenting to the employment of such weighers, measurers, gaugers, or inspectors; nothing herein contained, however, shall compel the employment, by any one, of any such appointee.

Sec. 11. Said corporation may inflict fines upon any of its
29 members, and collect the same, for breach of its Rules, Regulations, or By-Laws; but no fine shall exceed five dollars. Such fines may be collected by action of debt, before a justice of the peace, in the name of the corporation.

Sec. 12. Said corporation shall have no power or authority to do or carry on any business excepting such as is usual in the management of boards of trade or chambers of commerce, or as provided in the foregoing sections of this bill.

WM. R. MORRISON,
Speaker of the House of Representatives.
JOHN WOOD,
Speaker of the Senate.

Approved February 18, 1859:

WM. H. BISSELL.

30 EXHIBIT B.

Containing Certain Rules of the Board of Trade.

Rule IV.

Sec. 9. When any member shall be guilty of improper conduct of a personal character in any of the rooms of the Association, or shall violate any of the rules, regulations or by-laws of the Association or shall be guilty of any dishonorable conduct, for which a specific penalty has not been provided, he shall be suspended by the Board of Directors from all the privileges of membership for such period as in their discretion the gravity of the offense committed may warrant. When any member shall be guilty of making or reporting any false or fictitious purchase or sale, or where any member shall be guilty of an act of bad faith, or any attempt at extortion or of any dishonest conduct, he shall be expelled by the Board of Directors. Or when a member shall, either in the Exchange building or elsewhere, contract

to give to himself or another the option to sell or buy any of the articles dealt in on this Exchange in violation of any criminal statute of this State, he shall forfeit the right to have said contract enforced under the rules of this Association.

Any member suspended from the privileges of the Association shall not be allowed to trade or do any business upon the floor of the Exchange in his own name, either through a broker or employe.

* * *

Sec. 16. All charges made to the Board of Directors against any member of the Association for any default, misconduct or offense, shall be in writing, and in duplicate, and shall state the default, misconduct or offense charged; and the same shall be signed by
31 one or more members of the Association, by a business firm, one or more of whose members shall be a member of the Association, or by the Chairman of a committee of the Association.

Rule X.

Membership and Assessments.

Section 1. All applications for membership in the Association shall be referred to the Committee on Membership, who shall hold regular stated meetings for examining such applicants and their sponsors, in person, under such rules and regulations as may be made by the Board of Directors. Any male person of good character and credit, and of legal age, on presenting a written application, indorsed by two members, and stating the name and business avocation of the applicant, after ten days' notice of such application shall have been posted on the bulletin of the Exchange, may be admitted to membership upon approval by at least ten (10) affirmative ballot votes of the Board of Directors; provided, that three negative ballot votes are not cast against such applicant, and upon payment of an initiation fee of twenty-five thousand dollars, or on presentation of an unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the Rules, Regulations and By-Laws of the Association, and all amendments that may be made thereto.

Sec. 2. Every member shall be entitled to transfer his membership when he has paid all assessments due, and has against him no outstanding unadjusted or unsettled claims or contracts held by members of this Association, and said membership is not in any way impaired or forfeited, upon the payment of two hundred and fifty dollars, to any person eligible to membership who may be ap-
32 proved for membership by the Board of Directors, after due notice by posting, as provided in Section 1 of this rule. The membership of a deceased member shall be transferable in like manner by his legal representative without the payment of the transfer fee. Prior to the transfer of any membership, application for such transfer shall be posted upon the bulletin of the exchange for at least ten days when, if no objection is made, it shall be assumed the member has no outstanding claims against him.

Rule XXI.

Regular Deliveries.

Section 1. All deliveries upon contracts for grain or flax seed, unless otherwise expressly provided, shall be made by tender of regular warehouse receipts, which receipts shall have been registered by an officer duly appointed for that purpose. All such warehouse receipts shall be made to run five days from date of delivery on regular or customary storage charges, which regular or customary charges shall follow such warehouse receipts and be chargeable upon the property covered by the same, and shall be issued by such houses as have complied with the Rules of the Board of Trade and the Regulations and Requirements of the Board of Directors, and have been declared regular warehouses for the storage of grain or flax seed by said Board of Directors; and it shall be the duty of the Board of Directors, prior to the first day of July in each year, to inspect all warehouses, the proprietors or managers of which shall apply to have their receipts declared regular for delivery on contracts under the Rules of the Board of Trade, and no warehouse shall be declared a regular warehouse unless it is conveniently approachable by vessels of ordinary draft and has customary shipping facilities, and
33 unless the storage rates on all grain or flax seed in such warehouses in bulk and in good condition, shall not be in excess of one and one-quarter (1¼) cents per bushel for the first ten days or part thereof, and one-twentieth (1-20) of one cent per bushel for each additional day thereafter so long as such grain or flax seed remains in good condition, and unless the proprietors or managers of such warehouse are in good financial standing and credit and are carrying on and intend to continue to carry on the legitimate business of public warehousemen under the laws of the State of Illinois and in accordance with the Rules of the Board of Trade of the City of Chicago and the Regulations and Requirements of the Board of Directors and until the proprietors or managers of such warehouse shall file a bond with sufficient sureties in such sum and subject to such conditions as may be deemed necessary by the Board of Directors, under the Rules of the Board of Trade and the Regulations and Requirements of the Board of Directors in reference to warehouses. * * *

Warehouse receipts issued by warehouses so declared regular by the Board of Directors shall be regular for delivery on contracts under the Rules of the Board of Trade so long as the said warehouse shall continue to be a regular warehouse, but the term for which any warehouse is declared a regular warehouse to issue such receipts shall be limited to and expire on the first day of July in each year. No receipts issued on grain received in any warehouse shall be regular for delivery under the Rules of the Board of Trade after that date unless the warehouse upon which it has been issued has again been declared a regular warehouse by the Board of Directors; provided, however, that receipts issued before the first day of July by warehouses which

have been regular warehouses during the preceding year, but which have not been declared regular for the succeeding year, shall
34 be regular for delivery upon such contracts for six months after the first day of July; but nothing contained herein shall prevent the Board of Directors from declaring any warehouse, or the receipts thereof, irregular at any time for violation or non-compliance with the laws of the State of Illinois or any of the Rules of the Board of Trade or of the Regulations and Requirements of the Board of Directors.

Provided, that the Board of Directors shall have power, when in their judgment an emergency exists requiring more storage room than can be supplied by the regular elevator warehouses, or because of an inability to obtain insurance on grain stored therein, to declare any store-houses, vessels or places suitable for the storage of grain or flax seed within the Chicago Switching District—wherein the cost of delivery to vessels or railroad cars shall not be greater than such as is made by the regular elevators for the same service—to be regular places for the storage of grain deliverable under the Rules of the Board of Trade.

And provided further, that in case it shall happen that at any time there shall be no warehouses which shall be regular warehouses for the storage of grain and flax seed, then the Board of Directors may declare any warehouses suitable for the storage of grain or flax seed, whose aggregate capacity shall not exceed twenty-five million (25,000,000) bushels, regular warehouses for the storage of grain or flax seed, upon such terms and for such period as the Board of Directors in its discretion may deem necessary or proper, and the warehouse receipts issued by warehouses so declared regular under this proviso, shall be regular for delivery on contracts under the Rules of the Board of Trade, in the same manner as if issued by warehouses declared regular under the foregoing provisions of this section in regard to declaring warehouses regular for the term
35 ending on the first day of July in each year.

On and after January 1st, 1915, grain in cars, including that graded "subject to approval," shall be deemed a valid tender on contracts during the last three business days of any month, under the provisions of the rules pertaining to the delivery of warehouse receipts—the railroad receipt issued against same evidencing ownership serving to convey the title to the grain, same as warehouse receipts issued against grain in warehouses—when conforming to the following requirements:

A. When within the Chicago Switching District; or, if arriving from outside of the same, when it has reached the railroad yards, where samples are taken by the Illinois State Grain Inspection Department, and when billed to an elevator the receipts of which are regular on delivery; provided nevertheless, that grain so delivered shall be unloaded into the elevator to which it is billed before the delivery shall be deemed complete, and bills for grain so tendered shall not be due and payable until the elevator receipt covering same shall have been delivered to the buyer. Provided further, that deliveries under this rule may be diverted by the buyer from unloading

at a regular warehouse to any other unloading where the same will be weighed by the Weighing Department of this Association, by paying for the property before diversion. * * *

E. At any time when, in the judgment of the Board of Directors, an emergency exists, grain in cars shall be deemed a valid tender on contracts, on any business day of any month, when the grade of such grain tendered is evidenced as being a proper grade under the rules for tender, by a certificate of inspection of the Illinois State Grain Inspection Department showing the inspection to have been made during the preceding seventy-two hours, and when con-
36 & 37 forming to the other requirements of Paragraphs A, B, C and D of this Section, except that any excess or shortage in weights at time of unloading, if then weighed by the Weighing Department of this Association, shall be settled for at the current market value on day such variation is known to both parties.

38 EXHIBIT C.

Grain Growers' Contract.

Revised Form.

This Agreement made and entered into this — day of ——, 19—, by and between.....
.....
.....

(Here insert name of Elevator Company or Grain Growers' Association with whom the Grower contracts)

a corporation (or) an association duly organized and existing under the laws of the State of ——, (hereinafter referred to as the Elevator Company), and having its principal place of business at —— party of the first part, and the undersigned producer of grain as owner (entitled to crop rental) or as tenant, of land located in the Counties of —— ——, State of ——, (hereinafter referred to as the Grower), party of the second part,

Witnesseth:

That whereas the Elevator Company is the owner of, or has contracted for the use of, facilities for weighing, grading, storing and shipping grain in the county aforesaid, and has by contract with the U. S. Grain Growers, Inc. (hereinafter referred to as the U. S. Association), appointed the U. S. Association, an agricultural organization, instituted for the purposes of mutual help and not having capital stock or conducted for profit, as its exclusive sales agent in the marketing of grain of the members of said U. S. Association, in order to correct the present wasteful and uneconomic methods of handling grain, and in order that the said grain can be marketed and distributed on a cost basis; and

39 Whereas the Grower is a bona fide producer of grain by virtue of owning or operating farm land, is entitled to the

ownership and control of all or a part of the grain produced thereon, and is a member of the U. S. Association; and

Whereas the Grower desires to sell, and the Elevator Company desires to purchase, or handle for sale, all the grain that shall be produced as hereinafter provided;

Now therefore, the parties agree:

In consideration of the mutual obligations of the respective parties hereto, of the outlays and expenses incurred, and to be incurred, by the Elevator Company in carrying out the purposes of this agreement, and in consideration of the benefits derivable from the contractual affiliations of the Elevator Company with the U. S. Association:

Section 1. The Elevator Company agrees that it shall provide by ownership, lease or otherwise, facilities for weighing, grading, storing and marketing grain; that it shall receive and handle as hereinafter specified, or shall purchase at prices, and upon such terms, as are hereinafter set forth, all the grain hereinafter mentioned tendered to it by the Grower in accordance herewith; that it shall market all said grain through the U. S. Association according to the terms and conditions of the contract between the U. S. Association and the Elevator Company, a copy of which is attached hereto and made a part hereof as though copied herein.

This contract shall govern all the grain which is controlled by the Grower, and produced upon land described in the preamble of this agreement which he now owns, or shall hereafter own or operate during the life of this contract, and all such grain as he now has in possession, but not grain required and used by the Grower, or sold by him locally for local use for seed or feed, or sold otherwise with the written approval of, and upon the terms and conditions prescribed by, the U. S. Association.

Section 2. During the life of this contract the Grower agrees to deliver and sell to the Elevator Company, or otherwise market through said company, all the grain covered by this contract, and grown upon the land above described, at a price to be determined as hereinafter set forth.

Section 3. It is hereby agreed that nothing in this contract shall deprive the Grower of control in any degree over his own acreage or production.

Section 4. This contract shall become effective with respect to its provisions concerning grain, 10 days after receipt by the Grower of a written notice to that effect by the Elevator Company. This contract shall be in effect from such date to June 30, 1927.

This contract shall extend automatically and continue in full force and effect as to each of the parties hereto from year to year after June 30, 1927, until the same shall have been terminated by either party as to any kind of grain in accordance with the following terms and conditions:

(*a*) Notice in writing of said termination must be given by such party desiring the termination to the other party at least forty-five days, and not more than sixty days, prior to the close of the contract year, at the end of which it is sought to terminate the contract.

(*b*) The party desiring to make such termination must, prior to the effective date of such termination, pay any indebtedness then due the other party.

(*c*) If the foregoing conditions are fully complied with,
41 this contract shall thereupon be terminated on the date named; provided, however, such termination shall not affect any uncompleted sales or transactions or uncompleted obligations on current commitments between the parties hereto; nór release either from any indebtedness then unpaid or hereafter accruing under this contract.

Section 5. The title to the grain covered by this contract shall remain with the Grower, unless otherwise specified herein, until delivered at point of storage or shipment designated by the Elevator Company; at the time of such delivery title to the said grain shall pass to the Elevator Company when paid for, except when otherwise agreed upon by the parties hereto, except as to shipment by the Grower on consignment, in which case title shall remain with the Grower until sold by the U. S. Association, and unless some other arrangement shall be effected by mutual agreement between the parties at the time of the transaction.

Section 6. Upon notice in writing to the Elevator Company by the Grower, the contract between the Grower and said Elevator Company may be transferred to such other elevator company affiliated by contract with the U. S. Association, as the Grower shall designate, upon such terms as the U. S. Association shall approve.

Upon dissolution of the elevator company or failure for any other reason of said elevator company to function under the terms of this contract all right, title, interest and obligations of the elevator company shall immediately be transferred to the U. S. Association and shall then be subject to assignment to such other elevator company or grain growers' association as the U. S. Association shall elect.

It is further agreed that the Grower may, from time to
42 time, deliver his grain covered by this contract to another elevator company than the one executing this contract, provided the other elevator company has executed a contract with the U. S. Association for the exclusive handling of growers' grain through that agency, and provided the condition of the roads or the inability of the Elevator Company to handle the grain because of lack of storage, or transportation facilities, renders it necessary, and for any other reason held to be good and sufficient by the U. S. Association.

Section 7. This contract cannot be assigned, unless otherwise specifically provided herein, to any person except to the purchaser of, and in connection with the bona fide sale of, the land owned by

the Grower at the time of the execution of this contract, or except as it may be assigned by one tenant to another tenant, by an owner to a tenant, or by a tenant to an owner, succeeding to the former respectively in the operation of the land covered by this contract. In case of such transfer, this document may be filed with the Elevator Company, and a new contract may be executed in lieu thereof. Any other attempted assignment shall be of no force or validity whatsoever.

Section 8. This contract shall be terminated whenever the Grower shall for any reason be expelled from membership in the U. S. Association; but such expulsion shall not affect the rights and liabilities of the parties hereto as to the unmarketed grain then in the possession of either party.

Section 9. Whenever the Grower delivers any grain to the Elevator Company, he shall give the Elevator Company a signed statement showing what liens, if any, there are upon such grain; and the Elevator Company shall have the right to pay off all or
43 any part of the said lien or liens in order to perfect further its title to the grain, and thereupon the said Elevator Company shall make proper deductions for the same from the proceeds of the sale of said grain belonging to the Grower. If the amount of said liens is excessive in the judgment of the Elevator Company, the Grower hereby agrees to pay off sufficient to reduce the same to the amount stated by the Elevator Company to be reasonable, or the Elevator Company may handle said grain on the consignment basis, by and with the consent of the mortgagee.

Section 10. The Elevator Company agrees to observe and perform such rules and regulations covering the inspection, grading and weighing of grain as may be established by the U. S. Association not in conflict with state and federal rules, regulations and statutes.

Section 11. From time to time, upon the reasonable request of the Elevator Company, the Grower shall furnish such crop and statistical data as requested, on the forms provided for that purpose by the Elevator Company or the U. S. Association. The Elevator Company, upon the reasonable request of the Grower, shall furnish the Grower for his use such information concerning market conditions and quotations as it shall have in its possession.

Section 12. The Elevator Company shall pay, and the Grower shall accept as payment, for any and all of the grain covered by this contract, a price to be determined by one of the methods described in Sections 13 and 14, as the Grower may elect. The said right of election applies to each kind of grain separately.

Section 13. Method A. Individual Sales Method.—The Grower shall sell to the Elevator Company all grain covered by this contract which is not otherwise provided for by a valid election of the
44 said Grower, in accordance with either of the following methods, Method A-1 or Method A-2, or by any other method

mutually agreed upon which is in harmony with the other provisions of this contract. The Grower shall declare his choice of method at the time of the delivery of the grain to, or upon the order of, the Elevator Company.

A-1. He may sell for cash at a price offered by the Elevator Company.

It is expressly understood and agreed that the Elevator Company shall resell grain so purchased from the Grower through the U. S. Association but the same shall be sold at the discretion of the Elevator Company in respect to time, place and quantity, and without regard to the action of other companies or individuals employing the U. S. Association as a sales agent.

A-2. The Grower, singly or jointly with other growers, may consign grain through the Elevator Company for sale by any method by the U. S. Association, in which case control of time of delivery, shipment and sale shall remain with the Grower, and the net proceeds of sale, less deductions for costs of handling, as hereinafter provided, shall be returned to the Grower. This is without regard to the action of other individuals and companies employing the U. S. Association or Elevator Company as sales agent.

The Elevator Company is hereby exempted from liability for losses in handling, storing, shipping and marketing grain committed to it on the consignment basis, where the negligence of the Elevator Company is not the proximate cause of such loss or damage.

In all shipments by the Individual Sales Method, the U. S. Association shall act solely as sales agent for the Grower or the Elevator Company, and shall exercise no power of regulation or control over time of sale, time of shipment, destination, quantity of grain to be sold, or over the price at which the grain shall be sold, except as the Grower, under Method A-2, or the Elevator Company, under Method A-1, from time to time may, at their option, delegate to the U. S. Association authority to determine such questions as to individual transactions.

Inasmuch as the failure or refusal of the Grower to deliver to, and market and sell through, the Elevator Company the grain governed by this contract will cause detriment and injury to the Elevator Company, will impair its efficiency and the obligations of contracts to which it is a party, and will increase its expense and liability to damage, all of which items it is impracticable and extremely difficult to fix with precision; therefore, if the Grower shall fail or refuse to market or to sell through or to the Elevator Company any grain covered by this agreement, then the Grower agrees to pay to the Elevator Company, and the Elevator Company agrees to accept, the following sums per bushel: wheat, 10c; rye, 10c; flax, 20c; and all other grain, 6c; for all grain covered by this contract which is sold, marketed or withheld by or for the Grower other than in accordance with the terms hereof, as liquidated damages for the breach of this contract. The above agreed items are predicated upon average prices and market conditions for a period of years.

None of the aforesaid payments are to be construed to be a penalty

or forfeiture but as stipulated liquidated damages which are hereby agreed to as reasonably representing throughout the period covered by this contract what the Elevator Company and the members thereof will suffer by reason of such refusal or default.

This option, described as Method A, whereby the Grower may sell individually to the local Elevator Company, is severable and distinct from the provisions contained in Method B, is dependent
45¼ upon the consideration of the obligation of the Elevator Company to furnish facilities for the efficient marketing of grain through itself and affiliated companies and associations, upon the considerations stated in other sections (excepting therefrom Sec. 14) of this contract, and upon the consideration of the obligation of the Grower to sell all his grain covered by this contract to or through the Elevator Company; and the validity and binding effect of the provisions contained in this Section (13) shall in nowise be dependent upon, or related to, the provisions contained in Section 14 of this document.

All the provisions of this contract, save those contained in Section 14, shall apply with full force and effect to the sales of grain governed by this Section entitled "Method A."

Section 14. Method B. Pooling Method.—

B-1. Local Pool.—(*a*) The Grower may agree to have all of any kind of grain delivered by him to the Elevator Company commingled and mixed with grain of like kind and grade delivered by other growers, and the same sold during such period of time as may be agreed upon between the growers, provided storage and transportation facilities shall permit, in which case he shall receive, as payment, the average price secured for all grain of like kind and grade so co-mingled and sold, less deductions for costs of handling, as hereinafter provided, and subject to such equitable differentials as said company may find necessary to establish. The various lots of grain sold under this method shall be known as pools. There may be established as many pools of grain as there are kinds and grades of grain to be handled. The pools shall include all the commitments for any one year.

(*b*) The price on the grain delivered by the Grower shall
45½ be uniform with that paid other growers regardless of any variations in the price received from such sales for the several products of like kind and quality, subject to the differentials applicable, and deductions for the cost of handling.

(*c*) On or before the first day of May of each calendar year (or at a later date if no such action has been taken previously, provided ten or more growers so desire) all the growers tributary to the Elevator Company and signing this or other similar contract with the Elevator Company, who have elected to participate in the pooling of any kind of grain, may choose from among their number a committee of three, to be known as the Local —— Pooling Committee (stating in the blank the kind of grain) hereinafter designated the Local Pooling Committee, which committee shall exercise complete

control over the handling, shipping and selling of all pooled grain, determining the time, quantity and destination of sales, and effecting all necessary contracts and other arrangements for storage, etc., which may be deemed necessary for the efficient marketing of said grain; provided, however, that these provisions do not apply to "joint pools," Method B-2, where the U. S. Association shall be in control. The person designated by the Local Pooling Committee to have charge of the handling of grain that is pooled and the proceeds of the sale of same, shall file a bond with the U. S. Association as trustee for the growers joining in the pools subject to their jurisdiction; the said bonds shall be in such form, and amounts, and with such sureties as required by the U. S. Association, guaranteeing the faithful performance of the duties of the said person so designated. The U. S. Association, on request, shall furnish all necessary plans, contracts, forms, etc., for the proper handling of the pools. The aforesaid Local Pooling Committee, at the option of the majority
46 of said committee, may delegate its powers to the Elevator Company, or other agency, on condition that the grain is marketed through the U. S. Association.

(*d*) The purpose of these provisions is to secure control over the pooling of any kind of grain in the hands of those who pool. If satisfactory arrangements cannot be made with the Elevator Company for handling the pooled grain, then the said Local Pooling Committee, or committees, handling one or more kinds of grain, shall have the privilege of contracting for the storing and handling of the said grain or grains through any other elevator or warehousing company or agency as they may determine, without any regard to any conflicting provisions in this contract; provided the other agency handling the same shall contract for the exclusive marketing of the said grain through the U. S. Association.

In the election of said Local Pooling Committee each of the said growers shall have one, and only one, vote. The period for which said Local Pooling Committee shall be chosen shall be the period which will include all the pools of that kind of grain for that year, or until the successors are elected and qualified. The compensation, if any, of said Local Pooling Committee shall be at the option of the growers so pooling their grain, and shall be paid by them pro rata.

(*e*) The Local Pooling Committee shall have authority to determine when deliveries of grain shall be made. A Grower may express his preference and the Local Pooling Committee will be guided thereby so far as practicable.

(*f*) The Local Pooling Committee shall weigh, classify and grade the grain delivered to the pools by the Grower; credit the Grower therewith; mingle or pool said grain with grain of like kind
47 and grade delivered to the pools by other growers; and, at its discretion, clean, condition, blend or process the pooled grain to increase its value as food or as an article of commerce.

(*g*) The Local Pooling Committee shall furnish the Grower a "delivery ticket," and such other documents as may be required, upon the delivery of his grain, which shall show the classification, grade and weight of the grain delivered, the pool to which it has been committed, and any advance payment made upon it, and other information that may be required.

(*h*) The Local Pooling Committee shall determine the grade and quality of all grain tendered in accordance with rules and regulations established by the U. S. Association for pooling purposes. Regardless of what grade shall be ultimately placed upon said grain at the terminal markets, the aforesaid grading by the Local Pooling Committee shall control the proportional distribution of the net proceeds from the sale of said grain among the growers participating in any pool.

(*i*) The Local Pooling Committee shall sell through the U. S. Association the grain so pooled, at such times, in such quantities, and for such deliveries, as the Local Pooling Committee shall deem advantageous, and at the best prices obtainable through the U. S. Association under market and transportation conditions, together with grain of like classification delivered to the pool by other growers who have signed this or a similar contract, and pay over the net amount realized therefrom as payment in full to the growers, according to the value of the grain delivered by each of them, due debit and credit being given for all deductions for cost of handling, differentials and adjustments made by the Local Pooling Committee.

48 (*j*) In order to compensate properly the holder of delayed shipments, reasonable carrying charges on different kinds and grades of grain may be fixed from time to time by the Local Pooling Committee, to be credited to growers selling on the pooling basis.

(*k*) The Local Pooling Committee may transfer pooled grain from the local elevator to terminal or other elevators for storage, or other purposes.

(*l*) The Local Pooling Committee is authorized to exercise, without limitation, all the rights of ownership over the grain covered by this contract; to mortgage, pledge or hypothecate in its name, on its own account, all such grain, or evidences of the ownership or control of said grain, including bills of lading, warehouse receipts, etc. The Local Pooling Committee shall distribute said funds pro rata among the growers participating in the pool, or it may use part thereof for meeting expenses in the handling of the pooled grain.

(*m*) Any deductions or loss occasioned by the delivery on the part of the Grower of grain of inferior grade or condition, shall be charged against the Grower, and deducted accordingly from the proceeds going to the said Grower.

(*n*) Losses occurring in the handling, storing, shipping or marketing of pooled grain, not covered by paragraph (*m*), shall be

charged against the pool and not against the individual Grower delivering the grain directly affected thereby.

(*o*) The Local Pooling Committee shall make as substantial an advance payment on the grain committed to the pool as, in its discretion, market and financial conditions permit, and as soon as practicable after its delivery.

(*p*) The proceeds from the sale of grain shall be paid from
49 time to time, the final settlement being made within a reasonable time after the proceeds from the sale of all the grain in the pool have been received, and the deductions for costs of handling shall be determined.

B-2. Joint Pool.—When a Local Pooling Committee has been created, as above described, it shall be authorized to elect whether the grain delivered under this contract—that may be pooled with the grain of other growers locally—shall be pooled jointly with grain of like grade and variety of the growers in one or more other companies. In case the grower individually indicates his election to pool jointly (as provided in Section 23), or in case the local pooling committee elects the joint pool, then the undersigned grower hereby agrees that all of his grain so pooled shall automatically become committed for sale under the joint pooling method on the terms and conditions above specified as to the local pool except that the U. S. Association shall have the same control as the pooling committee does over the local pool, and shall have the grain sold in accordance with the provisions covering joint pools contained in the contract between the elevator company and the U. S. Association.

B-3. Partial Grain Pool.—The Grower may elect, by an appropriate entry at the time of execution hereof in Section 23, or at any subsequent time on an election blank to be provided by the U. S. Association for that purpose, to pool one-third of his grain therein. The term of such pool shall be from the date of such election to the termination of this contract.

The grain so pooled shall be under the control and management of the U. S. Association, which shall return to the growers joining in the said pool the total proceeds from the sale of the same less handling costs, as is provided for Joint Pools. The U. S.
50 Association may make such deductions and such advance payments as are provided for other methods of operation under this contract.

Inasmuch as the failure or refusal of the Grower to deliver to, and market and sell through, the Elevator Company will impair its efficiency and the obligation of contracts to which it is a party, will increase its expense, and liability to damage, will hinder the collection of average prices on grain, to the detriment and injury of the other growers participating in the said pool, all of which items it is impracticable and extremely difficult to fix with precision; therefore, if the Grower shall fail or refuse to market or to sell through the Elevator Company any grain covered by this agreement, then

the grower agrees to pay to the Elevator Company, and the Elevator Company agrees to accept, the following sums per bushel: wheat, 10c; rye, 10c; flax, 20c; all other grain, 6c; for all grain covered by this contract which is sold, marketed or withheld by or for the Grower, other than in accordance with the terms hereof, as liquidated damages for the breach of this contract; all parties agreeing that this contract is one of a series dependent for its value upon the adherence of each and all of the contracting parties to each and all of the said contracts. The above agreed items are predicated upon average prices and market conditions for a period of years.

None of the aforesaid payments are to be construed to be a penalty or forfeiture but as stipulated liquidated damages which are hereby agreed to as reasonably representing throughout the period covered by this contract what the Elevator Company and the members thereof will suffer by reason of such refusal or default.

In the event that it shall be necessary to enforce by judicial proceedings this contract as to grain pooled under Method B, the
51 Elevator Company shall bring the action for the benefit of all growers who shall have committed their grain for handling under said method, and any damages recovered thereby shall be the property of said growers.

The Grower hereby elects to market his grain covered by this contract as indicated in Section 23, in accordance with Method B, during the period ending June 30, 1927, or the unexpired portion thereof. This election shall continue from year to year after said date, until revoked by written notice to the Elevator Company, which shall be given within sixty days, and not less than forty-five days, prior to the close of the contract year when the Grower desires this election to terminate.

The Grower reserves the right to make a similar election in the future on other grains if he so desires.

This contract to sell, described as Method B, whereby the Grower may pool his grain for sale, is severable and distinct from the provisions contained in Method A, is dependent upon the special consideration of the receipt of average prices from the sale of grain in the pool; and the validity and binding effect of the provisions contained in this Section (14) shall in nowise be dependent upon, or related to, the provisions contained in Section 13 of this document.

All the provisions of this contract, save those contained in Section 13, shall apply with full force and effect to the sales of grain governed by this section, entitled Method B.

Section 15. In the event that any one or more of the foregoing methods, which may be elected by the Grower, shall for any reason become inoperative, or be held to be illegal by a court of competent jurisdiction from which no appeal can be, or is taken, then, and in that case, the Grower shall have the option of electing one
52 of the other methods named.

Section 16. The Elevator Company, for the sake of uniformity and in order to protect the Grower against the misuse of grain committed to it for sale under any of the methods described herein, and against the improper use of funds owing the Grower as the result of any pools established thereunder, agrees to be governed by and to use such receipts and accounting forms as may be prescribed and recommended by the U. S. Association, and that with respect to such grain to report to and accept accounting supervision by, the said U. S. Association.

The Elevator Company hereby agrees that all persons responsible for the custody of grain covered by this contract, or handling money derived therefrom, shall be adequately bonded, and that failing to require such bonds, the officers of the Elevator Company shall be personally liable for any default.

Section 17. Deduction for the Cost of Handling.—On all grain governed by this contract, the Elevator Company shall be authorized to deduct from the proceeds of the sale of said grain the following:

(*a*) The amount charged by the U. S. Association for the handling of said grain, in accordance with the contract between the U. S. Association and the Elevator Company, copy of which is attached hereto; and

(*b*) Such reasonable charges as may be established by the Eleva- Company for handling, weighing, cleaning, storing or performing such other services in connection with the said grain as the Grower may request, or as may be authorized by the terms of this contract.

Section 18. It is mutually understood and agreed that the services rendered by the U. S. Association and all subsidiary com-
53 panies are to be rendered to the Grower at cost; that the deductions for the cost of handling made from the proceeds of the sale of grain are payments on account; and that at stated periods the operating expenses will be determined, and any excess may be returned pro rata to the Grower, or invested in facilities for the more efficient marketing of the grain. Annual reports of the said receipts and expenditures shall be made, and copy of same shall be furnished each contracting Elevator Company. Deduction certificates, or other evidences of the same, shall be distributed among the growers in accordance with the provisions contained in the contract between the Elevator Company and the U. S. Association, copy of which is attached hereto.

Section 19. On grain purchased or handled on the basis of a price to be determined upon the net resale value thereof, less deductions for the cost of handling, the Elevator Company, regardless of who holds title, shall be liable for any loss or damage in the handling and storing of said grain, which is due to the negligence of the said company, but not otherwise.

It shall be the duty of the Elevator Company to keep fully insured all grain held in storage.

Section 20. It is mutually understood and agreed that the U. S. Association has a special property interest in the enforcement of this contract and may bring action thereon in its own name, in the name of the Elevator Company, or in the name of the Grower as the occasion may warrant.

Section 21. The Grower shall be permitted to market only that grain, under the provisions of this contract, which he himself, as land owner or tenant, has raised, or to which he is entitled from land which he may own and rent on the basis of a share of the
54 crops raised thereon.

Section 22. If the standard form of contract between the U. S. Association and the Elevator Company, referred to herein, shall be changed as to administrative details or methods of transacting business, said change shall be deemed made in the form of said contract attached hereto, and this contract amended accordingly.

Section 23. Part 1. Pooling Method.—
The Grower elects to market in accordance with B-1 known as the Local Pool the following grain covered by this contract: ——.
The Grower elects to market in accordance with B-2 known as the Joint Pool the following grain covered by this contract: ——.
The Grower elects to market in accordance with B-3 known as partial Grain Pool the following grain covered by this contract: ——.

Part 2. Individual Sales Method.—
The Grower elects to market in accordance with Method A known as the Individual Sales Method the balance of the grain covered by this contract which is not listed under Part 1 of this section.

Section 24. The signature of the Grower to this instrument shall be considered an application for membership in the U. S. Association, with which the Elevator Company is affiliated. The said Grower agrees to comply with all the requirements as to membership, subscribes and agrees to the Certificate of Incorporation and By-laws of the U. S. Association, the receipt of a copy of which is hereby acknowledged by the Grower; and the Grower further authorizes the use of any or all of the $10.00 initiation and
55 membership fee, in hand, paid to the U. S. Association, to be used for organization, and other expenses incidental to the completion of the organization of the U. S. Association, the creation of and ownership of securities in subsidiary and affiliated companies and other agencies, the securing of memberships, the acquisition of terminal warehouse facilities and for all other purposes authorized and deemed necessary by the Board of Directors of the U. S. Association for the immediate handling and marketing of grain and for the efficient organization of the grain marketing machinery contemplated in this agreement.

Section 25. No party, his agent, or other representative, has the right to vary the terms of this written instrument; and it is ex-

pressly agreed that no oral changes or modifications of the same have been made.

In witness whereof, the parties hereto, after a full reading and consideration of the terms hereof, have executed this contract on the day and year first above written.

Sample copy.

——— ———,
(Signature of Elevator Company or Local Grain Growers' Association.)
By ——— ———,
(*President,*) *Party of the First Part.*

———— ————,
(Signature of the Grower.)
(*Party of the Second Part.*)

Post Office ———.

Witness:
——— ———.

Witness:
——— ———.

What acreage (1921) ———.
Corn acreage (1921) ———.
Oats acreage (1921) ———.

56 The U. S. Grain Growers, Inc., hereby acknowledges receipt of the $10.00 initiation and membership fee from the above named applicant at the place and on the date last above written, and hereby admits the said Grower to membership, and approves the foregoing contract, and accepts and agrees to all obligations therein stated. If, for any reason, the said U. S. Association is not engaged in the actual sale of grain within two years from the date hereof, then the portion of the said $10.00 which is not expended shall be returned to the said Grower who executed the foregoing application for membership.

U. S. GRAIN GROWERS, INC.,
By ——— ———,
Agent.

Elevator Contract.

(Revised Form.)

This Agreement made and entered into this — day of ——— 19—, between the U. S. Grain Growers, Inc., a non-stock, non-profit corporation duly organized and existing under the laws of the State of Delaware (hereinafter referred to as the U. S. Association), party of the first part, and the ——— ———, a corporation (or) association, duly organized and existing under the laws of ——— (hereinafter referred to as the Elevator Company, unless otherwise specifically indicated), party of the second part, Witnesseth:

In consideration of the mutual obligations of the respective parties hereto, of similar obligations between other elevator companies and the U. S. Association, of the expenses incurred and to be incurred by the Elevator Company in providing local facilities for weighing, grading, storing, handling, processing and shipping grain; of the undertaking on the part of the U. S. Association to provide
57 competent statistical, financial, and other expert assistants, to establish crop and market news gathering agencies, and to acquire the use of marketing facilities for the purpose of providing an efficient co-operative marketing system for grain for the purpose of providing the producers with better credit and storage facilities which will tend to make possible a more even distribution of grain throughout the year, thereby tending to stabilize prices; and in order to reduce waste in handling, to encourage a more efficient production, to reduce transportation costs by more direct shipments from points of origin to centers of consumption, to make less frequent and violent fluctuations in prices due to speculation, and to reduce the excessive costs occasioned by the present wasteful, uneconomic system of marketing the grain crops of the United States.

Now, therefore, said parties agree as follows:

Section 1. The Elevator Company agrees to market through the U. S. Association all the grain committed to it for sale or shipment by members of the U. S. Association (hereinafter called the Growers) under the terms of a contract between the said growers and the Elevator Company (hereinafter referred to as the Growers' Contracts).

Sec. 2. The U. S. Association agrees to endeavor to sell said grain directly, or otherwise, to millers, manufacturers, exporters, or others within or without the United States at the best prices obtainable by it under market conditions, in accordance with the terms of this contract.

Sec. 3. Any grain from growers covered by this contract that is in possession of the Elevator Company and unsold upon the effective date hereof may be committed for sale under this contract.

58 Sec. 4. The U. S. Association shall make rules and regulations for standardizing the manner of keeping warehouse and elevator records and accounts and for making reports required by the U. S. Association; and the Elevator Company shall observe and obey all such rules and regulations and shall permit the examination or auditing of said records, accounts, and reports by the U. S. Association.

Sec. 5. The Elevator Company agrees to make reasonable requests of growers for such crop and statistical data as the U. S. Association may desire, and to transmit the same promptly to the said U. S. Association, using such forms for that purpose as may be provided by the said U. S. Association; and the U. S. Association, upon reasonable request therefor, shall furnish the Elevator Company for the use of the Grower, market news and other information

in its possession concerning the values and market conditions of grains and related products in this and other countries.

Sec. 6. The U. S. Association may make rules and regulations and provide inspectors and weighers to standardize the methods of weighing, handling, storing, and shipping of grain, subject to this contract; and the Elevator Company agrees to observe and perform any such reasonable rules and regulations as may be prescribed by the U. S. Association not in conflict with state and federal rules, regulations and statutes.

Sec. 7. The Elevator Company shall report to the U. S. Association any lien or liens upon the grain covered by this contract, and the U. S. Association may, within its discretion, pay off all or any part of such lien or liens and deduct such payments and any costs connected therewith from the proceeds of the sale of such grain. The Elevator Company shall warrant the title to all grain committed to the U. S. Association for sale, except as to any incum-
59 brances reported to the Elevator Company in writing prior to the time of shipment.

Sec. 8. Upon that grain which is committed to the Elevator Company to be sold on the basis of a price to be determined from the net resale value thereof, less deductions for the cost of handling, the U. S. Association, within its discretion, may make advance payments as market and financial conditions warrant; provided, the Elevator Company shall fully protect the U. S. Association against losses thereby.

Sec. 9. It is expressly agreed and understood that all debts of the U. S. Association shall be incurred in its own name and without responsibility therefor on the part of the Elevator Company, except when specific authority or approval of the same in writing shall have been given by the Elevator Company.

Sec. 10. The U. S. Association is exempted from liability for losses incurred in marketing and selling grain covered by this contract that are not due to its own negligence.

The Elevator Company shall be responsible for and charged with allowances, deductions or losses made or sustained by the U. S. Association arising from the negligence of the Elevator Company.

Sec. 11. Joint Pools.—In consideration of the mutual obligations of the parties hereto, that the Elevator Company shall furnish the necessary facilities for local handling and shall sell exclusively through the U. S. Association the grain received from members of the U. S. Association, and that the U. S. Association shall undertake to supervise the joint pooling of grain as defined in the Growers' Contracts, and shall undertake to provide the facilities which may be reasonably necessary for the same, it is hereby agreed between said parties as follows:

60 (*a*) The Local Pooling Committee, as defined in the Growers' Contracts, or other duly authorized agency, shall

receive, weigh, process, warehouse, and ship all grain committed to a joint pool by members of the U. S. Association, subject to orders of the U. S. Association which shall be observed and performed insofar as the facilities available reasonably permit. The U. S. Association shall classify all pooled grain by variety, quality, grade, or any other commercial standard and mingle or pool said grain with grain of like classification committed to the pool by others participating therein.

(*b*) The U. S. Association may order the transfer of said grain to any elevator and direct the manner in which it is handled therein.

(*c*) The U. S. Association shall undertake to sell said grain, together with grain of like classification and grade committed to the pool by others, at its own discretion in respect of time, conditions and terms, at the best prices obtainable by it under market conditions, collect the proceeds, and shall pay over the net amount received therefrom, as payment in full, to the authorized representatives of those participating in the pool, according to the value of the grain contributed by each of them, after making deductions for the cost of handling and such other charges against said grain as are authorized by this contract, and also making such credits as may be due.

(*d*) The Growers under contract with the Elevator Company under the Growers' Contracts, participating in a joint pool, agree that their grain shall be so mingled and that the net returns therefrom, less all costs of handling, advances and charges, shall be credited and paid to them on a proportional basis, considering all differentials and adjustments, out of the receipts from the sale of all grain of like classification.

(*e*) The pool shall be for a crop year, and payment shall
61 be made from time to time, as rapidly as practicable, within the discretion of the U. S. Association, in due proportion until the accounts of the pool are fully settled.

(*f*) The U. S. Association may borrow money in its name on the grain through drafts, acceptances, notes or otherwise, on any warehouse receipt or bill of lading, upon any accounts for the sale of the grain or on any commercial paper delivered therefor.

(*g*) Losses due to failure of customers or banks and losses occurring in the handling, storing, shipping or marketing of pooled grain shall be charged against the pool and not against the individual Grower or Local Pooling Committee or other agency delivering the grain directly affected thereby, provided the said loss is not due to the negligence of the said parties delivering the grain.

The foregoing agreement as to the handling of joint pools is severable and distinct from the balance of this contract; and the terms and conditions stated elsewhere in this agreement do not depend upon any of the provisions contained in this section.

Section 12. Deductions for the Cost of Handling.—The proceeds from all sales of grain made by the U. S. Association shall be paid by the purchasers thereof to the said U. S. Association, which proceeds shall be blended into one general fund; and the U. S. Association shall deduct from said proceeds such uniform amounts or percentages as shall be deemed necessary from time to time by the duly constituted officers or representatives of the U. S. Association, in order to meet all expenses properly chargeable to the handling of such grain; and also certain other deductions shall be made in order to provide special funds for carrying out the purposes of the U. S. Association. The deductions stated in the preceding sentence shall be described in this and all related contracts as
62 deductions for the cost of handling. The net proceeds from said sales above advances which have been made by a properly constituted authority shall be paid to those entitled to the same in accordance with the usual customs of the trade in handling such transactions.

The special funds mentioned in the preceding paragraph shall include those deemed necessary by the board of directors of the U. S. Association for the acquisition by purchase, lease or otherwise, of the control of property to be used by the said association or affiliated organizations, for the retirement of obligations incurred in the purchase of such property or in the operation of the business of the said association; for any debt due and unpaid from the grower to the U. S. Association, and whenever otherwise specifically authorized in writing by the grower; for the creation of reserves for such retirements, for renewals; and for any other expenditures which the said U. S. Association, its officers or agents, are authorized to incur.

So far as practicable all capital expenditures and interest charges on investments in marketing facilities shall be incurred by self-sustaining subsidiary, or affiliated organizations, and appropriate charges shall be levied against the grain using the facilities furnished by such organizations. All operating and capital expenditures, which are lawfully incurred in accordance with the powers and duties of the U. S. Association, shall be prorated fairly and justly in accordance with the judgment of the officers of the U. S. Association against the grain necessitating such expenditures; provided, however, that if the grain is sold on a grain exchange, and no other service of a substantial character is rendered by the U. S. Association, the total expenditures which shall be considered chargeable against said grain
63 shall in no case exceed one per cent of its value, unless the standard charge for similar service shall be more than one per cent, in which case said total charges by the U. S. Association shall not exceed such standard charge. On other grain where facilities requiring capital investment are used, the maximum deduction for any one year from the proceeds of all sales of grain to be made for capital expenditures, interest charges, etc. (aside from ordinary operating, including overhead expenses) in order to acquire the ownership or control over marketing facilities shall in no case exceed one per cent of the value of the grain so handled by the U. S. Association. The distinction, in accounting, between capital and operating in

come and expenditures, shall be in accordance, so far as practicable, with the rules adopted for common carriers by the Interstate Commerce Commission.

The amount of deductions for the cost of handling, as above specified, shall be estimated by the Board of Directors of the U. S. Association, and shall be so established as to yield as nearly as may be a sum of money equivalent to the operating and capital expenditures and reserves, and such other expenses as may be reasonably estimated as essential to be incurred by the U. S. Association, and its subsidiary organizations, for the ensuing year. In case a sum in excess of such requirement shall be collected during any fiscal year, it shall be set aside, or invested to meet the obligations or needs of the future, for the use and benefit of the Growers; unless the same shall be relatively large and substantial, in which case the U. S. Association may distribute all, or a part of the same, to its members in proportion to the grain sold through the U. S. Association, at such time as it shall determine. And the Elevator Company, for valuable consideration, receipt of which is hereby acknowledged, waives all right, title and interest in and to any portion of such funds.

It is understood and agreed that this contract and the contract between the Grower and the Elevator Company provide fully and adequately for the equitable distribution of the proceeds from the sale of grain by the U. S. Association or its subsidiary organizations, and that any charges and deductions hereunder revert back to the benefit of the Grower through his membership in the U. S. Association.

The U. S. Association shall issue certificates to the Elevator Company indicating the proportionate amounts of the deductions for capital expenditures and of the excess from other deductions attributable to grain received therefrom; and the Elevator Company shall issue proportionate certificates based thereon to the member of the U. S. Association. Such certificates shall indicate a pro rata interest in such deductions, distributable only in the form, at a time and in the manner determined by the U. S. Association. The said certificates shall be assignable freely by endorsement; but shall not be deemed as obligations of the U. S. Association with definite or other maturity, and shall not bear interest; and they shall not represent any obligations or rights, other than a proportionate ownership in certain assets held by the U. S. Association, which shall not be separable or subject to distribution during the life of the U. S. Association, except at the option of the duly constituted Board of Directors of the U. S. Association.

Section 13. Term of Contract.—This contract shall be in force from its execution to June 30, 1927, and thereafter shall continue in full force and effect as to each of the parties hereto from year to year, until the same shall have been terminated by either party in accordance with the following terms and conditions:

(*a*) Notice in writing of said termination must be given by such party desiring the same, to the other party at least forty-

five (45) days, and not more than sixty (60) days, prior to the close of the contract year, at the end of which it is sought to terminate the contract.

(*b*) The party desiring to make such termination must, prior to the effective date of the same, pay any indebtedness then due the other party.

(*c*) If the foregoing conditions are fully complied with, this contract shall thereupon be terminated on the date named. Provided, however, that this shall not affect any uncompleted sales or transactions between the parties hereto, nor release either from any indebtedness then unpaid or hereafter accruing under this contract, nor relieve the Elevator Company from its obligation to sell to or through the U S. Association, nor the U. S. Association from its obligation to market and sell, as the agent of the Elevator Company, all of the grain committed to it or purchased by it from members of the U. S. Association that was grown during the preceding season or seasons subsequent to the execution of this contract.

Section 14. On all grain which has been delivered to and is under the control of the Elevator Company, and covered by this contract which the Elevator Company fails to market through the U. S. Association in accordance with the terms and conditions herein stated, the Elevator Company agrees to pay to the U. S. Association and said U. S. Association agrees to accept the following sums per bushel as liquidated damages: wheat, 5c; rye, 5c; flax, 10c; for all other grains, 3c.

Section 15. It is mutually understood and agreed that the U. S. Association has a special interest in the enforcements of contracts between its members and the Elevator Company and may bring action thereon in its own name, in the name of the Elevator Com-
66 pany, or in the name of the Grower, as the occasion may justify.

Section 16. If this contract is executed by the Elevator Company as distinguished from a Local Grain Growers Association, the said Elevator Company represents itself as incorporated under the Co-operative Law of the state where operating and as paying patronage dividends.

In witness whereof, the parties to this agreement have hereunto set their hands and seals, the day and year first above written.

U. S. GRAIN GROWERS, INC.,

By ——— ———,

President, Party of the First Part.

By ——— ———,

President, Party of the Second Part.

Postoffice address: ———.

(Endorsed:) Filed Oct. 25, 1921. John H. R. Jamar, clerk.

67 [Endorsed:] 2400. U. S. District Court, Northern District of Illinois. John Hill, Jr., et al., Complainants, vs. Henry C. Wallace, Secretary of Agriculture, et al., Defendants. Bill. Robbins, Towley & Wild, Solicitors for Complainants.

68 And afterwards, to wit, on the 25th day of October, 1921, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

69 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

Tuesday, October 25, A. D. 1921.

Present: Kenesaw M. Landis, District Judge.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Order.

Upon filing the bill of complaint herein and upon motion of the plaintiffs' counsel,

It is ordered that the defendants show cause before this court at 10 o'clock a. m., on the 7th day of November, 1921, why a temporary injunction should not issue as prayed by said bill.

It is further ordered that until the hearing and decision of said motion, said Henry C. Wallace, Secretary of Agriculture of the United States, refrain from designating the Board of Trade of the City of Chicago as a contract market under the Future Trading Act, and from doing any other acts to compel said Board of Trade to comply with the provisions of said Act, and said Board of Trade of the City of Chicago and said Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan H. Clement, Fred S. Lewis, James C. Murray and John R.

70 Mauff refrain from applying to said Secretary of Agriculture for, or accepting from said Secretary of Agriculture, the designation of said Board of Trade as a contract market under said Future Trading Act, and from admitting to membership in said Board any representatives of any co-operative associations of producers, and from doing any other acts to comply with any of the provisions of said Act.

Enter.

KENESAW M. LANDIS,
Judge.

70½ And on, to wit, the 1st day of November, 1921, came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Appearance in words and figures following, to wit:

71 In the District Court of the United States, Northern District of Illinois, Eastern Division.

No. 2400.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Appearance.

We hereby enter the appearance of Board of Trade of the City of Chicago, Joseph P. Griffin, president and a director of said Board of Trade, and James J. Fones and Theodore E. Cunningham, vice-presidents and directors of said Board of Trade, and Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis and James C. Murray, directors of said Board of Trade, and John R. Mauff, secretary of said Board of Trade, as defendants and of ourselves as counsel for said defendants in the above entitled cause.

TAYLOR, MILLER, DICKINSON & PLAMONDON,
Solicitors for said Defendants.

GEORGE D. SMITH,
Counsel.

(Endorsed:) Filed Nov. 1, 1921. John H. R. Jamar, Clerk.

71½ And on, to wit, the 1st day of November, 1921, came the certain defendants by their attorneys and filed in the Clerk's office of said Court a certain Motion to Dismiss in words and figures following, to wit:

72 In the District Court of the United States, Northern District of Illinois, Eastern Division.

No. 2400.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Motion to Dismiss Bill of Complaint.

Now come Board of Trade of the City of Chicago, Joseph P. Griffin, president and a director of said Board of Trade, and James J. Fones and Theodore E. Cunningham, vice-presidents and directors of said Board of Trade, and Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis and James C. Murray, directors of said Board of Trade, and John R. Mauff, secretary of said Board of Trade, comprising a part of the defendants in the above entitled cause, by Taylor, Miller, Dickinson & Plamondon, their attorneys, and move the court to dismiss the bill of complaint in said cause for that:

Said bill of complaint is without equity on its face and does not state facts sufficient to constitute a cause of action in a court of equity.

Wherefore defendants pray that their said motion be sustained.

TAYLOR, MILLER, DICKINSON & PLAMONDON,
Solicitors for Board of Trade of the City of Chicago.

GEORGE D. SMITH,
Counsel.

(Endorsed:) Filed Nov. 1, 1921. John H. R. Jamar, Clerk.

72½ And on, to wit, the 7th day of November, 1921 came the Defendant by its attorney and filed in the Clerk's office of said Court a certain Motion to Dismiss in words and figures following, to wit:

73 In the District Court of the United States, Northern District of Illinois, Eastern Division.

D. C. Equity. No. 2400.

JOHN HILL, JR., et al., Complainants,

v.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

To the Honorable the Judges of said Court in Chancery Sitting:

Comes now the defendant, Henry C. Wallace, Secretary of Agriculture of the United States, by Charles F. Clyne, United States Attorney for the Northern District of Illinois, appearing specially for the sole purpose of this motion and for no other purpose, and moves the Court to dismiss this suit as to him for the following reasons:

1. That said defendant, at the time of the commencement of this suit, was and now is a resident of the District of Columbia.

2. That said defendant is not a resident of the Northern District of Illinois.

3. That said defendant has not been served with process in said District or at all.

4. That the Court has no jurisdiction over said defendant.

CHARLES F. CLYNE,
United States Attorney,
Attorney for Defendant Henry C. Wallace.

FRED LEES,
Assistant to the Solicitor,
U. S. Department of Agriculture,
Of Counsel.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

74 [Endorsed:] Form No. 680. No. —. In the District Court of the United States for the Northern District of Illinois, Eastern Division. John Hill, Jr., et al., Complainants, vs. Henry C. Wallace, Secretary of Agriculture, et al., Defendants. Special appearance and motion to dismiss. Filed —— —, 19—. —— ——, Clerk, by —— ——, Deputy. Charles F. Clyne, U. S. Attorney.

75 And on, to wit, the 7th day of November, 1921, came the Defendants by U. S. attorney and filed in the Clerk's office of said Court a certain Motion to Dismiss in words and figures following, to wit:

76 In the District Court of the United States, Northern District of Illinois, Eastern Division.

D. C. Equity. No. 2400.

JOHN HILL, JR., et al., Complainants,

v.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

To the Honorable the Judges of said Court in Chancery Sitting:

Comes now the defendants, Charles F. Clyne, United States District Attorney for the Northern District of Illinois, and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, by Charles F. Clyne, United States Attorney for the Northern District of Illinois, and move the court to dismiss the bill of complaint heretofore filed in the above entitled cause upon the following grounds, to wit:

1. That this is a suit for the purpose of restraining the assessment and collection of a tax, contrary to Section 3224 of the Revised Statutes of the United States.

2. That the bill seeks to restrain the enforcement of a criminal statute, to wit, the Act of Congress approved August 24, 1911 (Public No. 66—67th Congress), known as The Future Trading Act, without showing that the complainants will suffer irreparable injury by its enforcement.

3. That the bill seeks to enjoin the enforcement of a valid Act of Congress, to wit, the Act approved August 24, 1911 (Public No. 66-67th Congress), known as The Future Trading Act.

CHARLES F. CLYNE,
United States Attorney, Attorney for Himself and Defendants and John C. Cannon.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

77 [Endorsed:] Form No. 680. No. —. In the District Court of the United States for the Northern District of Illinois, Eastern Division. John Hill, Jr., et al., Complainants, vs. Henry C. Wallace, Secretary of Agriculture, et al., Defendants. Motion to Dismiss. Filed —— —, 19–. —— ——, clerk, by —— ——, Deputy. Charles F. Clyne, U. S. Attorney.

78 And afterwards, to wit, on the seventh day of November, 1921, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

79 In the District Court of the United States, Northern Distric
of Illinois, Eastern Division.

Monday, November 7, A. D. 1921.

Present: Honorable Kenesaw M. Landis, District Judge.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendant

This cause came on to be heard at this term and was argued b
counsel, thereupon, upon consideration thereof, now
It is ordered, adjudged and decreed that the motion for a temp
rary injunction be denied, and that the Bill be dismissed as to a
the defendants for want of equity.

Enter.

KENESAW M. LANDIS,
Judge.

79½ And on, to wit, the 7th day of November, 1921, came th
Complainants by their attorneys and filed in the Clerk's offi
of said Court a certain Petition for Allowance of Appeal in word
and figures following, to wit:

80 In the District Court of the Unit[illegible] States, Northern Distri
of Illinois, Eastern Division.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendant

Petition for Allowance of Appeal.

John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W
Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glase
and Alonzo B. Lord, the complainants, conceiving themselves to b
aggrieved by the decree of this court entered on the 7th day of N
vember, 1921, dismissing the above entitled suit, do hereby appe
from said decree to the Supreme Court of the United States for th
reasons specified in the assignments of error this day filed herei
and they pray that this appeal may be allowed and that a transcri
of the record and all proceedings herein be forthwith transmitte
to said court, and that the temporary restraining order issued here
be continued in force for the purpose of enabling said complainan

to apply to the Supreme Court of the United States for the further continuance of said restraining order.

JOHN HILL, JR.,
REUBEN G. CHANDLER,
ADOLPH KEMPNER,
EMIL W. WAGNER,
CHARLES E. GIFFORD,
ALFRED V. BOOTH,
EDWARD L. GLASER,
ALONZO B. LORD,
By ROBBINS, TOWNLEY & WILD,
Their Solicitors.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

80½ And on, to wit, the 7th day of November, 1921, came the Complainants by their attorneys and filed in the Clerk's office of said Court certain Assignments of Error in words and figures following, to wit:

81 In the District Court of the United States, Northern District of Illinois, Eastern Division.

JOHN HILL, JR., et al., Complainants,
vs.
HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Assignments of Error.

Now come the complainants, John Hill Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, and file the following assignments of error upon which they rely for grounds for reversal on the appeal in the above entitled cause:

1. That the District Court erred in dismissing said action for want of equity.

2. That the District Court erred in not entering a decree pursuant to the prayer of said bill.

3. That the District Court erred in not adjudging and decreeing that said Future Trading Act was void in toto because it violates the Constitution of the United States.

4. That the District Court erred in not adjudging Section 3 of said Future Trading Act contrary to the Constitution of the United States.

5. That the District Court erred in not decreeing that Section 4 of said Future Trading Act was unconstitutional and void insofar as it attempts to impose a tax of 20 cents on every bushel
82 upon each contract of sale of grain for future delivery made by or through members of a board of trade which has not

been designated by the Secretary of Agriculture as a contract market.

6. That the District Court erred in not adjudging and decreeing that Section 5 of said Future Trading Act and each of the sub-clauses (A), (B), (C), (D), (E), and (F) thereof were void because they violate the Constitution of the United States.

7. That the District Court erred in not adjudging and decreeing that Section 6 and sub-clauses (A) and (B) thereof, of said Act were void because they violate the Constitution of the United States.

8. That the District Court erred in not adjudging and decreeing that Section 9 of said Future Trading Act was void because it violates the Constitution of the United States.

9. That the District Court erred in not adjudging and decreeing that Section 10 of said Future Trading Act was void because it violates the Constitution of the United States.

10. That the District Court erred in not adjudging said Act void for the reason that it attempts to deprive complainants and other members of said Board of Trade and said Board of Trade of their property without due process of law.

11. That the District Court erred in not adjudging said Act void in that it seeks and attempts to regulate commerce that is not interstate but purely intra-state in character.

12. That the District Court erred in not adjudging said Act void in that the taxes imposed by said Act are not a a legitimate
83 exercise by Congress of its power to tax, but is a mere subterfuge, adopted for the purpose of regulating intra-state commerce.

13. That the District Court erred in not adjudging said Act void in that it authorizes unreasonable searches by the Secretary of Agriculture respecting the books and papers of members of the exchanges.

14. That the District Court erred in not adjudging said Act void in that it is class legislation and deprives members of exchanges of the right to contract for the purchase of grain for future delivery as others may.

JOHN HILL, JR.,
REUBEN G. CHANDLER,
ADOLPH KEMPNER,
EMIL W. WAGNER,
CHARLES E. GIFFORD,
ALFRED V. BOOTH,
EDWARD L. GLASER,
ALONZO B. LORD,
By ROBBINS, TOWNLEY & WILD,
Their Solicitors.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

83½ And afterwards, to wit, on the 7th day of November, 1921, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

84 In the District Court of the United States, Northern District of Illinois, Eastern Division.

Monday, November 7, A. D. 1921.

Present: Honorable Kenesaw M. Landis, District Judge.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Order.

Now come the complainants, and it appearing to the court that a petition for appeal and assignments of error have been filed herein,

It is ordered that an appeal to the Supreme Court of the United States from the decree entered herein on the 7th day of November, 1921, be and the same is allowed, that for the purpose of enabling said court to decide said appeal a transcript of record herein be forthwith transmitted to said court, and that complainants file their appeal bond in the sum of five hundred ($500) dollars, to be signed by at least two of said complainants and by a surety to be approved by this court, and that the temporary restraining order heretofore issued continue in force until the Supreme Court shall act upon the application of the complainants to that court for a continuance of said order, provided, however, that such application shall be made within 15 days from the date hereof.

Enter.

K. M. L.,
Judge.

84½ And on to-wit: the 7th day of November, 1921, came John Hill, Jr., and Emil W. Wagner, as principals, and Fidelity and Deposit Company of Maryland, as surety, and filed in the Clerk's office of said Court a certain Bond on Appeal in words and figures following, to-wit:

85 Know all men by these presents: That we, John Hill, Jr., and Emil W. Wagner as principals, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal

Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, and John R. Mauff, in the full and just sum of Five Hundred ($500) Dollars, to be paid to said Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois: John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, and John R. Mauff, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of November, A. D. 1921.

Whereas, lately, at the November term, A. D. 1921, of the District Court of the United States, in a suit pending in said court between John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward
86 L. Glaser, and Alonzo B. Lord, as complainants, and said Henry C. Wallace, Secretary of Agriculture; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, and John R. Mauff, as defendants, a decree was entered on the seventh day of November, 1921, dismissing said bill for want of equity, and said John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, have obtained an order of appeal from said court to reverse the decree in the aforesaid suit, and a citation directed to the said Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John

J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, and John R. Mauff, citing and admonishing them to appear in the Supreme Court of the United States within thirty days from the date of said citation. Now the condition of the above obligation is such that if the said John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, shall duly prosecute their bill with effect, and answer all damages and costs if they shall fail to make good their plea; then the above obligation to be void, else to remain in full force and effect.

JOHN HILL, JR. [SEAL.]
EMIL W. WAGNER. [SEAL.]
[SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By ARTHUR G. STANTER,
Agent and Attorney in Fact.

Approved:
TAYLOR.
K. M. L.

O. K.
CHARLES F. CLYNE,
TAYLOR, MILLER, DICKINSON & PLAMONDON,
For Board of Trade of the City of Chicago.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

87 In the District Court of the United States, Northern District of Illinois, Eastern Division.

D. C. Equity. No. 2400.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

To John H. R. Jamar, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

You will please prepare for the purpose of appeal a certified transcript of the entire record in the above entitled cause.

ROBBINS, TOWNLEY & WILD,
Counsel for Complainants.

Received copy November 7th, 1921.

CHARLES F. CLYNE,
U. S. Attorney, N. D. Illinois.
TAYLOR, MILLER, DICKINSON & PLAMONDON,
GEORGE D. SMITH,
Attys. for Board of Trade of the City of Chicago.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

88 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled John Hill, Jr. et al. vs. Henry C. Wallace, Secretary of Agriculture, et al., as the same appear from the original records and files thereof now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 8th day of November, A. D. 1921.

[Seal of Dist. Court U. S., Northern Dist. Illinois.]

JOHN H. R. JAMAR,
Clerk.

89 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Henry C. Wallace, Secretary of Agriculture; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, et al., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein John Hill, Jr., et al. are Complainants, and you are Defendants to show cause, if any there be, why the decree rendered against the said Complainants as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Kenesaw M. Landis Judge of the District Court of the United States, this 7th day of November, in the year of our Lord one thousand nine hundred and 21.

KENESAW M. LANDIS.

Duplicate.

Nov. 8, '21.

Ack. Service for all parties for whom I have appeared.

CHARLES F. CLYNE,
United States Atty.

Received a copy this 8th day of November 1921.
BOARD OF TRADE OF THE CITY OF CHICAGO ET AL.,
By TAYLOR, MILLER, DICKINSON & PLAMONDON.

[Endorsed:] No. 2400. Supreme Court of the United States. John Hill, Jr., et al. vs. Henry C. Wallace, Sec. of Agriculture, et al. Citation to the Supreme Court of the United States. Filed Nov. 8, 1921, at — o'clock M. John H. R. Jamar, Clerk.

90 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Henry C. Wallace, Secretary of Agriculture; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, et al., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein John Hill, Jr., et al. are Complainants, and you are Defendants to show cause, if any there be, why the decree rendered against the said Complainants as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Kenesaw M. Landis Judge of the District Court of the United States, this 7th day of November, in the year of our Lord one thousand nine hundred and 21.

KENESAW M. LANDIS.

[Endorsed:] 616. No. 2400. Supreme Court of the United States. John Hill, Jr., et al. vs. Henry C. Wallace, Sec. of Agriculture, et al. Citation to the Supreme Court of the United States.

On this 16th day of November, in the year of our Lord one thousand nine hundred and 21, personally appeared James L. Fort before me, the subscriber, John P. Cage, a notary public for the District of Columbia, and makes oath that he delivered a true copy of the within citation to David H. Blair, Commissioner of Internal Revenue of the United States, at 5:25 P. M. on November 15th, 1921.

JAS. L. FORT.

Sworn to and subscribed the 16th day of November, A. D. 1921.

[Seal of John P. Cage, Notary Public, District of Columbia.]

JOHN P. CAGE,
Notary Public, District of Columbia.

91 [Endorsed:] File No. 28,571. Supreme Court U. S., October Term, 1921. Term No. 616. John Hill, Jr., et al., App'ts, vs. Henry C. Wallace, Sec'y, &c., et al. Citation and service. Filed Nov. 16, 1921.

Endorsed on cover: File No. 28,571. N. Illinois D. C. U. S. Term No. 616. John Hill, Jr., Reuben G. Chandler, Adolph Kempner, et al., appellants, vs. Henry C. Wallace, Secretary of Agriculture; David H. Blair, Commissioner of Internal Revenue of the United States, et al. Filed November 10th, 1921. File No. 28,571.

No. 616.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

HENRY S. ROBBINS,
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BARNARD & MILLER PRINT, CHICAGO.

SUBJECT INDEX.

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BRIEF FOR APPELLANTS.

STATEMENT.

This suit seeks to have declared unconstitutional an act of Congress known as "The Future Trading Act," which became a law August 24, 1921.

For this purpose appellants, who are members of the Chicago Board of Trade, filed in the District Court in their own behalf and that of all of its other members, a bill in equity against the Secretary of Agriculture, the Commissioner of Internal Revenue, the United States District Attorney and Collector of Internal Revenue at Chicago (the officials charged with the enforcement of the

Act) and also against this Board of Trade and its directors.

The prayer of the bill is that these officials may be enjoined from enforcing as against said Board, and the Board and its directors may be enjoined from complying with, the provisions of this Act.

Upon motions therefor the District Court entered a final decree of dismissal for want of equity and this appeal was perfected directly to this court.

The Act is entitled, "An Act Taxing Contracts for the Sale of Grain for Future Delivery, and Options for such Contracts, and Providing for the Regulation of Boards of Trade and For Other Purposes," but the Act provides that it shall be known by the short title of "The Future Trading Act."

A copy of the Act is set out in the appendix to this brief. Its material provisions may here be summarized as follows:

It imposes a tax of 20c per bushel upon each bushel of grain involved in

(1) unilateral contracts commonly known as "puts" and "calls";

(2) contracts of sale of grain for future delivery, EXCEPT

(a) Where the seller is at the time of the sale the owner of the grain, or a grower thereof, or the owner or renter of the land on which the grain was, or is to be grown, or an association of such owners, growers, or renters; or

(b) Where such contract of sale is made *by or through* a member of a board of trade, which has been designated by the Secretary of Agriculture as a "contract market" and such contract is evidenced by a memorandum in writing giving in detail the terms thereof; and it is also provided that such board member shall keep such memorandum for three

years, or longer, if the Secretary of Agriculture so directs, and that such memoranda shall be open to the inspection of any representative of the Department of Agriculture or the Department of Justice.

Before the Secretary of Agriculture may designate a board of trade as a "contract market."

(a) It must be located at a terminal market upon which cash grain is sold in sufficient volumes, etc., to reflect the general value of the grain and which has recognized official weighing and inspection service.

(b) Its governing board must provide for the making and filing by the board, or members thereof, as the Secretary of Agriculture may direct, such *reports* as may be prescribed by him showing the details of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery, and such board must also provide, by such rules as the Secretary of Agriculture may direct, for the keeping by it, or its members, of *records* in permanent form showing the details and terms of all such transactions, the parties thereto, any assignments or transfers thereof, and the manner in which the same have been fulfilled, discharged or terminated. Such records must be kept for three years, or a longer period if the Secretary of Agriculture shall so direct, and must at all times be open to the inspection of any representative of the Department of Agriculture or the Department of Justice.

(c) It must prevent the dissemination by it, or its members, of any false or misleading report concerning crop or market conditions.

(d) It must provide for the prevention of the manipulation of prices and cornering of any grain.

(e) It must admit to membership "any duly authorized representative of any lawfully formed and conducted co-

operative association of producers having adequate financial responsibility; *provided,* that no rule of a contract market against rebating commissions shall apply to the distribution of earnings among the bona fide members of any such cooperative association."

(f) It must provide for making effective the orders and decisions of the Secretary of Agriculture.

No board of trade may be designated as a "contract market" until it shall comply with the above conditions and give a sufficient assurance that it will continue to do so.

A Commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, is authorized to revoke the designation of any board as a "contract market" upon its failure to comply with the above requirements, or to enforce its rules of government which are made a condition of its designation as a "contract market."

The Secretary of Agriculture, upon notice to, and complaint against, any person violating the provisions of the Act, is authorized to order all "contract markets" to refuse trading privileges thereon to such person, and, as above stated, the board of trade is required by the Act to make such order effective—which it can only do, in the case of a member, by suspending or expelling him, and in the case of a non-member by requiring under penalty of suspension or expulsion all its members to refuse to accept orders from such proscribed non-member.

The Secretary of Agriculture is also authorized to make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade and to publish the result of such investigation.

Any person who shall fail to evidence his contracts for future delivery by the required memoranda in writing, or

to keep the records, or make the reports required, or who shall fail to pay the tax, is guilty of a misdemeanor, punishable by a fine of not more than $10,000 or imprisonment for not more than one year, or both.

As the bill was dismissed as upon demurrer, its allegations present the facts, which are as follows (Rec., 2-14):

The Chicago Board of Trade is a corporation created by a special charter granted to it by the State of Illinois in 1859 (Rec., 16-18), with power (1) to admit such persons as members, and expel such persons, *as it shall see fit*, (2) to maintain such rules and by-laws as it may think proper for the government of the corporation and for the management of the business of its members and the mode in which it shall be transacted, (3) to appoint committees of arbitration for the settlement of differences submitted by members or others, and the award in any such arbitration, when filed in the Circuit Court, is given the effect of a judgment, upon which execution may issue, (4) to appoint such persons as it may see fit to examine, measure, weigh, gauge, or inspect flour and grain, and the certificate of such appointees as to the quantity or quality, etc., shall be evidence between the buyer and seller assenting to the employment of such appointee.

Pursuant to its charter this Board has adopted and maintained for many years regulations respecting the inspection, sampling and weighing of grain, etc.

Its rules (Rec., 3-5), also vest the government of the Board in its board of directors, authorize such directors to determine what persons are of sufficiently good character and credit to be admitted to membership, and provide that each such applicant shall pay an initiation fee of $25,000 or present an unimpaired membership to be

transferred, and shall sign an agreement to abide by the rules and by-laws of the association.

Such rules also provide for the suspension of any member defaulting on a business contract or in the payment of an award, and also provide that for certain other offenses he shall be suspended or expelled.

The Board has never admitted to membership any corporation; but its rules provide that, if any two members of the Board are executive officers and bona fide and substantial stockholders of any corporation, it may become a party to trades or contracts on the exchange; but in that event these two members may be disciplined for any default on its contracts as fully as upon any business obligation of their own.

The Board has always levied annually an assessment upon its members sufficient in the aggregate to more than meet all its expenses, and with this surplus it has acquired real estate in the business district of Chicago, upon which it has constructed a large building, containing its trading hall and offices and also surplus space, from which it derives a substantial revenue. The fair market value of this property is $2,000,000 over and above a mortgage thereon, and the yearly assessments of its members now aggregate $240,000.

The Board itself transacts no business and pays no dividends. Its chief function is to provide an exchange room, where its members may meet daily between certain market hours, and make with each other contracts for the purchase of grain and other products of the farm. It also prescribes and enforces rules respecting its members' contracts, and enforces by disciplinary proceedings, when necessary, compliance by its members with their contracts; it also maintains and enforces rules for the settlement of disputes arising between its mem-

bers out of their contracts and displays in its exchange hall all available statistical and other news concerning crops, etc.; and about its only other function is to determine who are fit persons, as respects character and financial responsibility, to be and remain its members.

The Board's main source of revenue is the annual dues paid by its members; and it is incumbent upon the Board to make it profitable for persons to become and remain members and to pay such yearly assessments; and, in order to render its disciplinary power over its members sufficiently effective to maintain a high character for business probity among its members, it is also necessary for this Board, not only to make it profitable for members to remain such, but also to give a substantial value to its memberships. This the Board does by

(1) Restricting the number of its members;

(2) Providing that only members may make transactions in its exchange room;

(3) Prescribing, and compelling all its members to conform to, certain fixed reasonable minimum rates of commissions which its members, when acting as agents, must charge their principals for making transactions on its exchange.

For this purpose the Board has for many years maintained (as do all commercial exchanges) a rule known as the "commission rule," which prescribes the minimum rates of commission.

An essential feature of this rule is a provision (Rec., 5) for the expulsion of any member who violates the rule or evades it indirectly by giving *rebates* to customers, etc.

Before this feature of the rule was added in 1900, memberships were selling at $800 each, and since such amendment and its strict enforcement memberships have sold as high as $11,000, and are now worth about $7,000.

In recent years there have been organized in most of the grain-producing states many so-called farmers' cooperative associations, with the avowed purpose of enabling farmers, who become members thereof, to market their crop at actual cost and without paying any commissions to members of the exchanges. To attain this their plan is to have a salaried officer of the cooperative organization elected a member of the exchange, and through him to sell all the grain of members of this organization —he temporarily charging the prescribed commissions and ultimately rebating back to such members the aggregate of such commissions (after paying his salary and incidental expenses) on the basis of the number of bushels of grain each farmer shall have sold through the organization—such rebates being commonly called "patronage dividends."

There has recently been organized a corporation known as "U. S. Grain Growers, Inc.," membership in which is limited to producers of grain. This corporation is seeking to unite all farmers' cooperative organizations and elevator companies into one great movement—of which this "U. S. Grain Growers, Inc.," will be the controlling element—for the purpose of selling the grain of its members at actual cost and without the payment of any commissions to members of any grain exchange. (Rec., 5, 7, 22.)

In the past members of these cooperative associations have sought to become members of this Board; but they have been refused admission because their avowed purpose was to violate the commission rule of the Board, which would destroy the business of those of its members, who receive grain on consignment for sale, and the bill avers that the ultimate effect of this would be to much impair, if not destroy, the value of all memberships, and make it difficult for the Board to retain sufficient mem-

bers to pay assessments necessary to maintain the exchange.

Members of the Board engage only in the following kinds of trading in grain:

1. Some members receive from producers or country grain dealers grain to sell on commission and pay to their principals the proceeds less their commissions; and members also, either as agents or principals, buy and sell grain for immediate delivery in Chicago. Such transactions are known as "cash" transactions, and by the terms of The Future Trading Act they are excluded from its provisions.

2. Many members of the Board send letters or telegrams at the end of each day to country points offering to purchase grain. When accepted these become contracts for the purchase of grain upon the condition that the grain is "to arrive" in Chicago within a certain time. (This kind of trading was involved in *Chicago Board of Trade* v. *United States*, 246 U. S. 231.) Other members in like manner make contracts for the *sale* of grain to be shipped from Chicago to milling or exporting points within a certain time. While, strictly speaking, all these contracts are contracts for future delivery, they are expressly excluded from the provisions of the Future Trading Act by being denominated therein as "cash sales for deferred shipment or delivery." Moreover, contracts of these two kinds are not strictly exchange transactions; that is, the offers are generally sent out from, and the acceptances are generally received at, the offices of members of the exchange. The contracts do not result from or in any trading on the exchange itself.

3. Another kind of trading consists in the making of unilateral contracts, known as "puts" and "calls." A "call" is a contract in which one person pays to another a

small sum ($5.00 for every thousand bushels of grain involved) for the privilege of calling on the latter to deliver to the former at a future date a specified quantity of grain at a named price; and a "put" is a contract in which one acquires the privilege of delivering to another a certain quantity of grain within a certain time at a named price. When the course of the market makes it profitable for the paying member to exercise his option, he does so by making with the other member a bi-lateral contract for future delivery (such as is hereinafter more fully described) for the quantity and at the price named in the optional contract, or he delivers or receives in performance of the optional contract a warehouse receipt—issued by a grain-mixing elevator, which has been made regular by the Board. Upon contracts of this character, this Act imposes a prohibitive tax of 20c a bushel.

4. Many members daily engage, either as principals or agents, in the making in the exchange room of the Board of contracts with other members for the purchase and sale of grain for delivery during a certain named future month. Such contracts relate almost wholly to wheat, corn and oats, and the volume of trading in these commodities is so large that the Board has set aside in its exchange room for such trading three separate spaces, commonly known as "pits," where many of its members daily gather and by open *viva voce* bidding make these contracts for future delivery. The rules of the Board require that all orders received by members to buy or sell for future delivery shall be executed in the open market in the exchange room during the prescribed market hours (9:30 a. m. to 1:15 p. m.). In all such contracts the buyers and sellers are personally present in Chicago, and any offer to buy or sell for future delivery by a member in the exchange room during market hours becomes a contract with the member who first accepts the offer.

The bill sets out in detail the characteristics of such contracts. The only grain that can be delivered, or is contemplated to be delivered, on these contracts is grain that has already lost whatever interstate character it may have possessed. (This is more fully explained on pages 34 to 38 of this brief.)

For twenty years preceding the late war the price of wheat in Chicago has been generally below $1.00 per bushel, the price of corn generally below 60c a bushel, and the price of oats generally under 40c a bushel. The tax of 20c a bushel imposed by The Future Trading Act is, therefore, a prohibitive tax.

Appellants requested the board of directors of the Board to institute a suit to have this Future Trading Act declared unconstitutional, but that request was refused, and the bill alleges that these directors intend to comply with the act because they fear to antagonize the public officials, whose duty it will be to construe and enforce it. (Rec., 14.)

Errors Relied Upon.

That the District Court erred:

1. In not holding that the provision of the Act (Sec. 5 (e)), which requires the Board to admit to membership representatives of farmers' co-operative associations and to permit "patronage dividends," violates the Federal Constitution in that it deprives the Board, as well as its individual members, of their property without due process of law.

2. In not holding that those sections of the Act, which regulate boards of trade and their members and their actions and transactions and require memoranda, reports and records thereof (being Sec. 5 (b) (c) (d) (e) (f), Sec. 6, Sec. 9, and Sec. 10), violate the Constitution of the

United States in that thereby Congress attempts to regulate commerce which is wholly intrastate in character.

3. In not holding that part of the Act, which imposes a tax upon "puts" and "calls" (Sec. 3) and upon contracts for sales of future delivery when not made by or through a member of a board of trade which has become a contract market, or by a grower of grain, etc., (Sec. 4), violates the Constitution of the United States in that it is not within the power conferred on Congress to levy taxes.

4. In entering the decree dismissing the bill instead of a decree granting the relief prayed by the bill and adjudging said Future Trading Act unconstitutional in the particulars above stated and *in toto*.

ARGUMENT.

Point I.

THE POWER TO IMPRESS PRIVATE PROPERTY WITH A PUBLIC USE.

All private property is held subject to the proper exercise of this power, and any statute, which is the exercise of this power, does not violate the Constitution by depriving the owner of his property without due process of law.

Munn v. *People*, 94 U. S. 113.

The question here is whether Sec. 5 (e) of The Future Trading Act can be sustained as a proper exercise of this power. This calls for a consideration of the origin and scope of this power.

The early common law divided business occupations and the properties used therein into two classes. One included those which were strictly private. In these the common law permitted the owners to sell, or refuse to sell, their property and their services in connection therewith as they pleased, and to charge therefor any price they saw fit. They could serve, or allow the use of their property to, one person, and refuse a like privilege to another for no reason whatsoever.

The other class comprised those occupations, in which owners had so used their property that the public acquired an interest therein to such an extent that such owners were not permitted either to discriminate between those desiring to share in the service rendered, or to make an unreasonable charge for such service. The common law placed on such owners the duty to serve all alike and at reasonable rates.

In this class were the local miller, the inn-keeper, the carrier (in that age a stage-owner), the owner of a wharf on a navigable water (wharfinger), etc.

As travel and transportation developed, it gave rise to railroads and other modern common carriers; but these were obliged to seek and obtain from the state special privileges, such as the right of eminent domain, and thereby they submitted themselves to a larger measure of governmental control than exists as respects the class now under consideration. Having once devoted their property to use as a railroad, these are not permitted to withdraw it from that public use. But even as respects this class the power to legislate has been confined to statutes which benefit the public at large.

(See *Mo. Pac. Rwy.* v. *Nebraska*, 164 U. S. 403, and other cases cited on pp. 20, 21 of this brief.)

It has never been held, even as respects these modern common carriers, that any person could be legislated into a position where he might share with the owners the profits accruing from the use of their property in public service.

Returning now to the second of the classes above named—as business life became more complex and the instrumentalities used therein became more enlarged and complicated, it became necessary that there should rest somewhere the power to impress other properties and their owners with a public use and thereby impose on them this duty of serving all alike and at reasonable rates.

The courts of the country are now agreed that this power is legislative and not judicial in character.

Express cases, 117 U. S. 29.

The American Live Stock Co. v. *Live Stock Exchange*, 143 Ill. 210.

Ladd v. *S. C. P. & M. Co.*, 53 Texas 174.

The legislatures of the states were the first to exercise this power. Apparently the first of these statutes passed the Illinois Legislature in 1871. It undertook to fix the maximum rates of storage for the grain-mixing elevators of Chicago. That statute was attacked in this court—

Munn v. *Illinois*, 94 U. S. 113,

upon the ground that it violated the due process of law clause in the 14th Amendment of the Constitution, but this court upheld the statute as a proper exercise of the power to impress property with public use, or to regulate property, whose use by the owner had already impressed it with a public use.

Similar statutes were subsequently passed in New York and North Dakota, and these were sustained by this court on the same principle.

Budd v. *New York*, 143 U. S. 517.
Brass v. *North Dakota*, 153 U. S. 391.

Subsequently this court sustained as a proper exercise of this power a Kansas statute—which required insurance companies to charge reasonable rates—and amplified the doctrine by making the business, rather than the property used therein, the object to be impressed with a public use.

German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389.

All these statutes were alike in that the benefits they conferred accrued to the public generally and not to a mere class of the public, and their purpose was only to impose the rule requiring that all should be served alike and at reasonable rates.

None of them required the owners of the property or business to do more than permit all to share in the service rendered without discrimination and at reasonable rates. The foregoing is also true of the state statutes

involved in the numerous state decisions reviewed by this court in *Budd* v. *People, supra.*

Neither the inn-keeper, stage-owner, wharfinger, etc., under the common law, nor the grain elevator owner or insurance company under these statutes, was required to admit others to share in the ownership of the business or the instrumentality rendering the service or in the profit accruing to the owners therefrom. Thus in

Munn v. *Illinois,* 94 U. S. 133,

this court said:

> "There is no attempt to compel these owners to grant to the public an interest in their property, but to declare their obligations, if they use it in this particular manner."

The foregoing decisions of this court also make it clear that the power to impress property with a public use is, as respects a state, "an exercise of the police power of the state," (*Budd* v. *New York,* 143 U. S. p. 545). And in

Lawton v. *Steele,* 152 U. S. 133-137,

when discussing the nature and extent of the police power, as exercised by a state statute providing for the destruction of fishing nets, this court said:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference."

It thus appears clear that in a proper case a state, in the exercise of its police power, may by statute impress property with a public use.

But the general police power resides only with the states. Congress may exercise such power only so far

as it is included in the other powers conferred on it by the Constitution.

Hamilton v. *Kentucky Distilleries*, 251 U. S. 146.
United States v. *Cruikshank*, 92 U. S. 542.
Tennessee v. *Davis*, 100 U. S. 257, 302.

If Congress has also this power to impress property with a public use, it must reside in its commerce power. But is that power broad enough for this? It is merely the power to "regulate" commerce.

Again, this power as respects any particular object must reside exclusively either in the state or in Congress; it cannot well reside in both without producing conflicting statutes.

Where the property is wholly within a state and the business, in which it is used, is mainly intrastate, the power to impress them with the public use ought, it would seem, to belong exclusively to the state.

If so, the Future Trading Act is not the exercise of the power to impress the Board of Trade and its property with a public use; for the Board transacts no business, its property is in Illinois, it is used by the Board only to provide a meeting place for traders, offices for its own use, and space to sub-let to others; practically all who make trades in its exchange room are residents within that state; all the trading for future delivery—which constitutes the major part of the trading in the exchange room—is intrastate commerce, as is pointed out on pages 34-43 of this brief; the selling on commission by members in the exchange room of grain consigned to them by the owners is, as respects the service they render, not interstate commerce; (*Hopkins* v. *United States*, 171 U. S. 587); the buying of grain by members on a commission basis is of the same character; much of the buying and selling for immediate delivery upon the exchange is

necessarily between principals, who reside in Illinois, and relate to grain, which has never been out of Illinois; while most of the buying and selling of grain by members of the exchange for deferred shipments to or from Chicago is not made in the exchange room but by letters or telegrams between the offices of such members and the other parties to the purchases or sales.

In short, the property of the Board is situate in Illinois, the Board itself transacts no business upon its property, and the business that the Board permits its members to transact thereon is mostly of a domestic and local, as distinguished from an interstate, character; and it would seem that the power to impress this property and business with a public use ought to belong to the State of Illinois alone.

The further discussion, or the decision, of this question, may perhaps be unnecessary because, assuming that this power is a part of the commerce power of Congress, this provision of the Future Trading Act, which forces representatives of farmers co-operative associations into membership in the exchanges, is in no sense a proper exercise of the power.

It is not for the benefit of the public generally but only of a certain class—farmers' organizations. Associations of millers, exporters, etc., are not given the right to force their members into the exchanges.

This exchange, its rules and by-laws, its exchange room and its members, should be considered jointly as constituting a local instrumentality of trade capable of rendering a service in the purchase and sale of grain, for which others are willing to pay. It is therefore not to be distinguished in character from privately owned grain-elevators, inns, stage-coaches, etc. In all cases the property involved is privately owned, and the only interest therein

that a statute may grant to the public (without paying for the property) is an interest in the use of the property, or, in other words, the right of all to share in the service it renders on fair and common terms.

But The Future Trading Act does not undertake to compel the one thing that the common law and these statutes authorize. Its purpose is not to get for all producers of grain the right to have their grain sold on the exchange. They already have that. Nor is its purpose to better the service, which the exchanges render, or to effect a change in the present rates of commission, which non-members must pay to their agents on the exchange for the sale or purchase of grain there.

There is no claim that the rates now charged are not as low as they can be, nor that the service furnished by these instrumentalities is not efficient.

What the Future Trading Act does is to force agents of farmers' organizations into membership in the exchanges, so that all farmers, who join co-operative associations, may escape the payment of the commissions—which all others must pay—and thereby share in the profit which accrues from the rendering of the service —a profit which has resulted to the members of the exchanges from the creation and maintenance for many years, (at private expense of money and effort) of these instrumentalities of trade.

This instrumentality or privately owned property—and the profit accruing from its use—like the grain elevator or insurance company, and the profit therefrom belong to those who have created and own it, and nothing short of the exercise of eminent domain can impair or deprive such owners of that property or of their profit from its use.

Thus the power to impress property with a public use should not protect Section 5 (e) of this Act from the

application to it of the due process clause of the 5th Amendment.

II.

THE PROVISION OF THE ACT (SEC. 5 (E)) REQUIRING THE EXCHANGE TO ADMIT TO MEMBERSHIP ANY DULY AUTHORIZED REPRESENTATIVE OF A CO-OPERATIVE ASSOCIATION OF PRODUCERS, AND SANCTIONING "PATRONAGE DIVIDENDS," DEPRIVES THE BOARD OF TRADE AND ITS MEMBERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Any statute which takes private property for a private purpose—as well as one which takes property for a public use without the payment of adequate consideration,—violates the due process clause of the 5th and 14th amendments to the Constitution.

Mo. Pacific Rwy. Co. v. *Nebraska*, 164 U. S. 403.
Missouri Ry. v. *Nebraska*, 217 U. S. 196.
Chi., M. & S. P. R. R. v. *Wisconsin*, 238 U. S. 491.
Eubank v. *Richmond*, 226 U. S. 137.
Cole v. *La Grange*, 113 U. S. 1.

The first of these cases has many points of similarity to the case at bar. Farmers of a certain county in Nebraska (Farmers' Alliance No. 365) had associated themselves together for the same purpose as sought by Sec. 5 of The Future Trading Act—to market their crops at cost—by constructing and operating a local elevator for their joint benefit. The statute of Nebraska prohibited railroads from giving any preference or advantage to, or subjecting to any prejudice or disadvantage, any person or locality, or any particular description of traffic *in any respect whatever.*

The railroad company had already leased to two private persons sites upon its rights of way for the construction of local elevators at that point, and this as-

sociation of farmers claimed that the refusal of the railroad company to permit them also to construct an elevator on its right of way violated the foregoing statute, and the State Supreme Court so held. But this court held that "was in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners," and that this was not due process of law.

The 5th amendment applies to an intangible right as well as to tangible property.

Monongahela Co. v. *United States,* 148 U. S. 312, 343.

Oklahoma v. *Kansas Nat. Gas. Co.,* 221 U. S. 229, 253.

Again, any statute which materially impairs the value or profitable use of private property is as much a taking within the due-process-of-law provision as the actual appropriation of it.

Peabody v. *U. S.,* 231 U. S. 530.

Filor v. *U. S.,* 9 Wall. 45, 49.

Indeed, a pecuniary loss need not be shown. If the right of property is invaded, the statute is within the constitutional provision.

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."
>
> *Buchanan* v. *Warley,* 245 U. S. 60, 74.

A statute, therefore, which, like the one at bar, compels an unwilling owner to admit others into a right to enter upon and use his property, violates the due-process-of-law provision, unless there is a taking for public use—in which case compensation must be made.

To apply these principles to the case at bar: This Board was by special charter created by the State of Illinois a *private* corporation with power to acquire and hold property. Originally this right was limited to $200,000 worth of property. By subseqent statute this limitation was removed. For more than sixty years the members of this Board have annually paid assessments or dues sufficient to meet the current expenses and create a large surplus, which is now represented by an exchange building in Chicago of the value (above a mortgage) of more than $2,000,000. This property is just as much privately owned as is any office building or private residence.

It is as much a violation of the due-process clause for Congress to give outsiders entrance into this building as would be a statute compelling owners of residences to admit roomers into their homes.

This Board, acting under a power expressly given it by its charter, has for sixty years confined access to and use of, a part of this property—its exchange hall—to such persons, as in the exercise of their discretion its board of directors should deem to be fit persons to there make contracts with other members. *Indeed, the basic right inuring from membership in this association is the right to enter this exchange hall and there trade.*

Many efforts have been made to get the Illinois courts to interfere with, and control, the exercise of this discretion and determine who should be its members, but always without success.

Board of Trade v. *Nelson*, 162 Ill. 431, 438.
People v. *Board of Trade*, 80 Ill. 134.

In one case involving a similar exchange (*American Live Stock Co.* v. *Live Stock Exchange*, 143 Ill. 210), the Illinois Supreme Court expressly held that the courts

were without power to compel the exchange to accept any person as a member.

The reason for this attitude of the courts is well expressed in

McCarthy Bros. v. *Minneapolis Chamber of Commerce*, 105 Minn. 497,

as follows:

> "The reasons why the rule and regulations with reference to the acquisition of membership must be given full force and effect lie on the surface. The business transacted by such organizations and the methods pursued are unusual and special. The members do not deal at arms' length to the same extent as under ordinary circumstances. An unusual degree of confidence is imposed by each member in his fellow members, not because human nature is more trustful and confiding in the Chamber of Commerce than elsewhere in the marts of trade, but because the business is transacted under unusual self-imposed restrictions and with extraordinary provisions for enforcing verbal agreements and understandings which possibly may not be enforceable in the courts."

This Board has also thought it advisable (Rec., 4) not to permit any corporation to become a member; but it allows a corporation to make trades upon its exchange, if *two* of its executive officers and substantial stockholders are members, and it makes these two members subject to discipline for failure of their corporation to comply with its business obligations.

By The Future Trading Act farmers' associations may participate in the trading by having *one* representative admitted to membership.

Sec. 5 (e) compels this Board to admit to its exchange room—and the privilege of trading there with other members—*any* duly authorized representative of a co-operative farmers' association (which, of course, means that *all* such representatives must be admitted), provided only

that the association—not the representative—has adequate financial responsibility. The representative need not be a fit person, if his association has sufficient financial responsibility.

Thus, the right which every exchange has—and must have in order to function properly—to admit into its exchange room and trading privileges only such persons as, in the judgment of its officials, are in point of character, business integrity and financial standing, fit persons to join in the trading, is, by this act, destroyed in favor of a certain class—farmers' organizations and their representatives.

The proper exercise of this discretion by the directors is of great importance to all trading members, because the first member to accept a bid in the "pits" gets the trade, and trades for very large amounts are made oftentimes in an excited and noisy market by mere word of mouth, and no opportunity is afforded to ascertain, before the making of the trade, the present financial responsibility of the trader. The rules requiring margins often afford inadequate protection when the markets are excited and the fluctuations are sudden and large.

Thus, the principal protection to traders is the character of the trader and the assurance—which the character of the trader only can give—that he will not go beyond his financial depth.

This act deprives the exchange and its members of the present right to have its directors determine whether any applicant has the requisite character and financial responsibility. As respects farmers' associations, the Secretary of Agriculture is made the final judge of this. If the exchange should refuse to admit a representative of a farmers' association, which he—disagreeing with the directors—thinks has sufficient financial responsibility, he may direct the admission of the applicant, and if this

is refused, he may deprive the exchange of its designation as a "contract market."

Thus this exchange is, by this Future Trading Act, expressly deprived of its present charter right to say who may enter its privately owned exchange room and there enjoy the privilege of trading.

If the State of Illinois has the power to establish and maintain public markets, it might under its right of eminent domain take this exchange building and make it a public market and then admit to the trading privileges there such persons as it thought fit.

It may be also, if this trading on this exchange were interstate commerce, that Congress might also acquire this exchange building and make it a public market, to which all might resort under such restrictions as Congress might see fit to impose; but such act by Congress or the state could only be upon the payment of adequate compensation.

This Future Trading Act does not contemplate such a taking; nor does it seek to make these grain exchanges *public* markets. For a market—to be public—must be one to which all classes of traders may resort. This act gives the right of access only to a particular class—co-operative associations of farmers, who are only on the selling side of the market. They who are on the buying side of the market—the exporters, millers and consumers—are not given the right to form associations and have their representatives admitted to membership under an immunity from compliance with the commission rule of the exchange.

The question, therefore, is whether Congress may, without violating the Fifth Amendment to the Constitution, compel the admission to membership in the exchange of persons, who otherwise would not be acceptable as mem-

bers, and this without payment of any compensation whatever to the exchange or its members.

This question is not to be confined to the power as exercised by this act. "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." (*Brown* v. *State of Maryland*, 12 Wheat. 439.) If the power exists at all, it authorizes Congress to compel the admission to membership of *all* persons now pecuniarily disadvantaged by not being members. If farmers may organize, and through a representative get admittance to this exchange and there sell all their grain through the exchanges *at cost*, Congress may also force into the exchanges representatives of associations of millers, exporters, etc., who may also wish to enjoy the facilities, which the exchange provides, for the purpose of *buying* at cost.

While the extent of the impairment of the property right is not here a vital question, we cannot refrain from here pointing out the injurious results of such legislation, and thereby bringing to the attention of the court more fully the nature of the right which this Act impairs.

The exchange itself transacts no commercial business. It neither buys nor sells. It is not an organization for profit. It neither contemplates, nor has ever declared, any dividends. It is merely an instrumentality by means of which its members join in providing and maintaining an exchange hall where they may meet to trade as individuals, and by means of which they may determine who are fit persons to share these trading privileges and they may promulgate rules to control their business relations and to fix the terms of, and to enforce, the contracts which they make with one another, and to settle the business disputes arising therefrom.

Its principal source of revenue is the yearly assessments of its members, which now produce $240,000 a year.

Hence the exchange must make it profitable for a sufficient number of persons to become and remain members; and this can be done only by making the value of the benefit that the membership confers upon the member exceed his share of the expense of maintaining the exchange. If the members find no profit or advantage in trading, a membership will have little,—and if any, only a sentimental—value, which would not be enough to induce members to pay the large assessment necessary to meet the expense of maintaining the exchange.

There are several ways, in which an exchange makes the privilege of membership valuable enough to attract members. It maintains an exchange hall, where the making of trades is convenient and economical. It confines trading there to those who are members, thus making it necessary for non-members to employ members as agents, if they desire to share in the trading. But, if Congress or a state may compel the exchange to give access to the salaried agents of all those, who would otherwise employ members to make trades on a commission basis, the business of making trades for others on a commission—which comprises a substantial part of the business of the members of an exchange—will be destroyed or seriously impaired, and it would no longer be profitable for that class of members to remain members.

But it is not enough for an exchange merely to confine trading to its own members and thereby enable them to profit by acting as agents for non-members. To function properly, it is necessary that it should attract and retain members of the right character and credit.

One of the things essential to the successful maintenance of an exchange is its disciplinary power over its members. It must compel them to abide by their con-

tracts, and otherwise maintain a high standard of business integrity. An exchange can do this only by the exercise of its disciplinary power to expel or suspend members, who are guilty of uncommercial conduct, or default on their contracts. But the fear of suspension or expulsion loses much of its deterrent influence when the privilege of remaining a member becomes of little value. Hence, all exchanges have found it necessary to give value to the privileges of the membership by prescribing minimum rates of commission to be charged by members when acting as agents for others.

This the courts recognize as a legitimate function of the exchange. The Illinois courts have held valid the minimum commission rule of the Chicago Board.

Board of Trade v. *Dickinson*, 114 Ill. App. 295.

The courts of other states concur in this view.

State v. *Duluth Board of Trade*, 107 Minn. 506.

To render this commission rule effective, it is necessary to prohibit—as this Board does (Rec., 5)—members from directly or indirectly rebating to their principals any part of their commissions.

It is alleged in the bill—and admitted—that this commission rule has materially added to the value of memberships on this Board. (Rec., 6.)

This Future Trading Act entirely nullifies this commission rule as respects these farmers' organizations, as is more fully explained in the Statement of this brief at page 8. It permits the farmers of a state, or of a wider territory, to join one association, designate one of its salaried officers as its representative, have him admitted to the exchange, and by the means of the "patronage dividends" have all their grain sold there *at cost*.

And this is no idle fear or remote contingency. For

it is alleged in the bill—and admitted—that, in addition to a large number of existing farmers' co-operative companies, an organization has recently been formed and is functioning—the "U. S. Grain Growers, Inc."—which proposes to avail itself of this law to market the grain of all farmers at cost by resorting to these "patronage dividends." (See the elaborate contracts through which this is being accomplished, which are set out at pages 22 to 40 of the record.)

Thus, the present act impairs—and the full exercise of the power claimed for Congress would completely destroy—the right of this exchange, not only to retain sufficient members to derive the income necessary to meet its expenses, but would also impair the disciplinary power of the exchanges over their members.

It therefore seems clear that Sec. 5 (e) of the Act violates the 5th Amendment of the Constitution, and that the protection of his amendment is available, not only to the Board itself, but also to its members, who are the beneficial owners of the exchange building and of the facilities which the exchange provides.

There is still another aspect of this question. Each of these 1,610 privileges of membership in this Board is a valuable right—a species of property—which is now worth about $7,000. It has a saleable value because an incoming member may tender the transfer of a membership of an outgoing member in lieu of his initiation fee. This court has held memberships in some exchanges to be assets in bankrutpcy.

Hyde v. *Woods*, 94 U. S. 523.
Page v. *Edmunds*, 187 U. S. 596.

This valuable right belongs to the individual member and he may sue to protect it, especially where the Board refuses to do so. (*Dodge* v. *Woolsey*, 18 How. 331.)

Furthermore, the relationship between the members and the Board (Rec., 4) gives rise to an obligation of the exchange to abide by its rules. (*Ryan* v. *Cudahy*, 157 Ill. 108.)

One rule provides that no person shall be admitted to membership unless 10 of the 18 directors shall regard him of good character and credit. Doubtless this rule must yield to a valid statute, but not to one which is unconstitutional—as is the present Act. As the Board and its directors propose to comply with this Act and admit to membership representatives of farmers' associations in utter disregard of this rule, the individual members have the right to compel by injunction their compliance with the foregoing rule. This in itself constitutes a sufficient basis for this suit.

Again members may as individuals maintain this suit because, if this Act succeeds in permitting the members of farmers' organizations to market their crops at cost through the exchange, it will—as alleged in the bill and admitted (Rec., 7)—in time destroy the business of the many members who now receive grain on consignment and sell it on commission, and ultimately much impair, if not wholly destroy, the value of all memberships, which are the property of the individual members.

The federal court at Kansas City (Circuit Judge Stone, District Judges Pollock and Munger), recently issued a temporary injunction restraining enforcement by the Attorney General of a statute of Missouri, which—like section 5 (e)—compelled the grain exchanges of that state to admit to membership representatives of farmers' cooperative associations. No opinion was filed.

It is, therefore, respectfully submitted that Sec. 5 (e) of this Act violates the 5th Amendment to the Constitution.

III.

THE PROVISIONS OF THE ACT WHICH AIM TO REGULATE BOARDS OF TRADE ARE NOT WITHIN THE COMMERCE POWER OF CONGRESS.

According to its title the Act is one (1) to tax certain transactions, and (2) to regulate boards of trade.

Thus this statute differs from some, which have come under review by this court, and which on their faces appear to be merely an exercise of the power to levy taxes. In such cases this court has felt itself deterred from going behind the profession of the statute to infer an ulterior motive in Congress.

Here this court is under no such restraint. Congress by the title has said that parts of this Act are not the exercise of the taxing power, and has left this court free to treat as the exercise of the commerce power those provisions of the Act, which are clearly regulatory in character. Such are

1. The provision of Sec. 4 (b) which requires *members* of a board of trade to evidence each contract for future delivery by a written memoranda showing, "the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery," and requires that such memoranda be kept for a certain time and be open to the inspection of the Departments of Agriculture and Justice.

As the Act does not contemplate the payment of a tax by such members this clause is clearly one of the regulating provisions of the Act.

2. The provisions of Sec. 5 (b), which requires (a) the Board to provide by its rules (there is no other way of providing) for the making and filing, either by the Board or its members, as the Secretary may direct, of *reports*

in the form and at the times prescribed by him "showing the details and terms of all transactions entered into by the board or the members thereof," and (b) also the keeping of permanent *records,* either by the board or its members, as the Secretary of Agriculture may direct, showing the details and terms of all such contracts, the parties thereto, the assignments and transfers thereof, and the manner in which said transactions are fulfilled. Such records are required to be preserved for a certain time, and to be open to the inspection of the Department of Agriculture and the Department of Justice. This even authorizes the Secretary of Agriculture to compel this Board itself to make reports and keep records of the transactions of its members.

The foregoing provisions relate to transactions, which are not taxed by the Act and are, therefore, clearly some of the regulating provisions of the Act.

3. That provision of the Act, Sec. 5 (e) which requires the Board to admit to membership all duly authorized representatives of co-operative associations of producers, and nullifies the commission rule of the exchange as respects such representatives. The transactions of these new members are not taxed and this provision is purely regulatory.

4. That provision of the Act which requires the Board to make effective (by suspending or expelling the member) any order, which the Secretary of Agriculture may make under Sec. 6 (b), directing the boards of trade to refuse all trading privileges to any person—whether member or not—who shall, in the opinion of the Secretary, violate any of the provisions of the Act.

5. Sec. 5 (c) (d), requiring the Board to prevent the dissemination by the Board or any of its members, of false reports that may tend to affect the price of grain

and also requiring the exchange to provide for the prevention of manipulation and "corners."

6. Section 9 of the act which provides for the investigation of boards of trade by the Secretary of Agriculture.

As the Act does not impose any tax upon a board of trade, or its members, all the foregoing provisions requiring action by the board of trade, or authorizing investigations by the Secretary of Agriculture, are clearly regulatory in character.

Hence the question here is, whether any of the objects of these regulating provisions are sufficiently interstate in character to be embraced within the power of Congress.

First. Is that provision of Sec. 5 (e) which modifies the commission rule of the exchange in the interest of co-operative associations of producers—which in effect prescribes what certain members of the exchanges may charge their principals for selling grain—within this commerce power?

That question is answered in the negative in

Hopkins v. *United States,* 171 U. S. 578,

where this court held that a rule of a live stock exchange, which prescribed the rates of commission, did not invade the field of interstate commerce, saying:

> "The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the state from other states or from the territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city. * * *

"On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce."

Second. Let us next consider such of the above regulations as relate to contracts for the sale of grain for future delivery. The bill (Rec., 7-11) describes the character of future trading on this exchange, as follows:

"Such contracts relate almost wholly to wheat, corn and oats, and the volume of such trading is so large, that said Board has set aside in its exchange room three separate spaces, upon each of which it has constructed a circular raised platform, commonly known as a 'pit,' where its members may conveniently, and do daily, gather and make such contracts with each other by open *viva voce* bidding; and respecting such trading the rules of said Board have for many years required, and now require, that all orders received by members to buy or sell for future delivery must be executed in the open market upon its exchange room and only during the hours of regular trading; and said rules also provide that no trade or contract for future delivery shall be made or offered to be made by any member of said Board, except between 9:30 a. m. and 1:15 p. m., except on Saturday, when the trading must close at 12 o'clock M., by reason whereof all such trading in grain for future delivery by members of said Board is in fact confined to said Exchange room and said market hours; and both buyers and sellers in all said contracts are personally present in the City of Chicago when the contracts are made; and another rule of said Board requires that any offer to buy or sell for future delivery when made openly in the exchange room during the hours for regular trading, may be accepted by any other member of said Board, and that the contract shall be made with the member first accepting said offer.

"That all such contracts for future delivery contemplate and provide for the delivery of warehouse receipts instead of the grain, and only of such warehouse receipts as the rules of said Board make valid for delivery; that a rule of said Board now and for many years in force [see Rec. p. 20], provides that only such warehouse receipts shall be deliverable upon contracts for future delivery as shall be issued by warehouses which have complied with the rules, regulations and requirements of said Board, and have been by the Board of Directors declared regular warehouses for the storage of grain; and none of the warehouses thus made regular are located outside of the State of Illinois; and said rules also make it the duty of the Board of Directors on the first of July in each year to designate the grain elevators or warehouses in Illinois whose receipt shall be deliverable between its members on their contracts for future delivery for the ensuing year; but said rule also provides that said Board of Directors may declare, as regular elevators, only such elevators or warehouses as have been licensed by the State of Illinois to conduct a public warehouse, pursuant to the provisions of a statute of that state [Ill. Rev. St. Ch. 114, Sec. 139, 140, 148] * * * which said Act provides that it shall be the duty of every warehouseman of Class 'A' to receive for storage any grain tendered him and to mix such grain with other grain of a similar grade received at the same time as near as may be, and such statute further provides that the warehouse receipt issued for such grain so received into said warehouse shall state on its face that the grain mentioned therein has been received into store, to be stored with other grain of the same grade received about the same time as the date of said receipt; and by said Act it is further provided that, when any holder of any such warehouse receipt shall demand the delivery of the grain therein mentioned, said proprietor shall deliver on said receipt such of the grain of that particular grade as was first received by him in store or which had been the longest time in store in his warehouse; and, while said statute provides that, with the consent of any depositor of grain and the proprietor of a warehouse, the particular grain of

said depositor may be kept in a bin by itself, apart from that of other owners, and that such bin shall be marked and known as a 'separate bin,' and that the receipt therefor, shall so state and contain the number of such special bin, grain in Chicago is seldom, if ever, stored in a public warehouse of Class 'A' in a special bin, and if so stored the warehouse receipts issued for such grain are not, and never have been, deliverable upon said contracts of future delivery made by members of said Board; nor has said Board ever declared a regular elevator under said rule any warehouse which has not been licensed under said statute to conduct a warehouse of Class 'A.' * * *

"That the space of each of said warehouses is subdivided into numerous partitions or bins, the capacity of said bins ranging from 2,000 bushels to 7,000 bushels; and that almost all grain is received in Chicago upon cars, whose capacity is from 1,500 to 2,000 bushels, and whenever a carload of grain is unloaded into any of said elevators of Class A, it is immediately carried into one of said bins and is there at once mixed with other grain of like grade already stored in such bin, and thus any individual carload of grain immediately loses its identity upon being received in such warehouse; and when the person, to whom the warehouse receipt is issued for such carload of grain, or his assignee, tenders said warehouse receipt to said warehouseman for the purpose of having the grain therein specified delivered to him, he never gets the identical grain delivered to such warehouse when it issued said receipt.

"That in this trading for future delivery on the exchange of said Board during any year many millions of bushels of wheat, corn and oats are bought and sold for future delivery, and as respects at least three-quarters of the grain covered thereby, said contracts are fulfilled or settled without any delivery of any warehouse receipts, but are settled through a system of offsetting purchases with sales and the payment of differences in the market prices under a system commonly known as the 'ringing' system which is provided for by the rules of said Board; and that practically all said remaining future contracts are performed or completed during the

month specified for delivery by the delivery by sellers to buyers of warehouse receipts of public warehouses of Class 'A' which warehouses have been made regular under the said rules of said Board.

"That while said Rule XXI makes grain in cars deliverable on future contracts during the last three days of the delivery month mentioned in said contract, where receipts are issued by the carrier, it is also provided by said rule that said delivery shall not be complete, and that bills for said grain so tendered shall not be payable, until said grain shall have been unloaded into an elevator which has theretofore been made regular for delivery by said Board of Directors, and elevator receipts covering said grain shall have been delivered to the buyer; and that the amount of grain in carload lots actually delivered under the provisions of this rule on contracts for future delivery is much less than 1 per cent of the total volume of said trading for future delivery and even a very small percentage of the total quantity of grain actually delivered upon said contracts; and that, while said rule also authorizes said Board of Directors, when an emergency exists, to provide that grain in cars may be tendered during any business day of the month specified in the contract for future delivery, said rule also provides that such tender shall not be deemed a complete delivery until such grain shall have been unloaded into an elevator made regular by said Board and the warehouse receipt therefor shall have been delivered to the buyer; and while said Rule XXI also authorizes said Board of Directors, when an emergency exists requiring more storage room than can be supplied by the regular elevators, to make other places suitable for the storage of grain regular for storage of grain deliverable under the rules of the Board, said Board has seldom, if ever, been able to induce proprietors of places otherwise suitable for the storage of grain to qualify under the Warehouse Statute of the State of Illinois for the short period of time during which any such emergency exists, and that the quantity of storage room in Class 'A' warehouses declared regular by said Board of Trade is such that an emergency, such as is contemplated in said rule, rarely occurs in Chicago, and then lasts for only a short period of

time, and that at the present time said Board of Directors of said Board have not exercised said emergency powers conferred upon them, and the only grain now deliverable on said future contracts is grain for which warehouse receipts have been issued by said regular elevators, and carloads of grain tendered during the last three days of the delivery month followed by delivery of warehouse receipts when such grain is unloaded into a regular elevator." (This future trading on this exchange was before this court in *Board of Trade* v. *Christie*, 198 U. S. 236.)

Thus, all contracts for future delivery of grain made by or through members of this Board are made in its exchange room in Chicago during certain market hours only, and the only parties to these contracts are members then and there present.

Less than one-quarter in volume of these contracts are performed by delivery, and upon such contracts the delivery is of warehouse receipts entitling the holders to receive a specified number of bushels of grain of a particular grade out of a larger common mass in store. These receipts on their face state that the grain, for which they are issued, has been mixed with other grain of the same grade; and when the receipt holder calls for his grain the warehouseman, to comply with the state law, makes delivery out of the grain *that has been longest in store.* If any component parts of the common mass of grain, out of which the receipt is filled, have come from other states, they have completely lost their interstate character by this inter-mixing.

Are such contracts for the future delivery of grain interstate commerce? This question seems fully answered in the negative by this court in the case of

Ware & Leland v. *Mobile County*, 209 U. S. 405, where a statute of Alabama imposing a tax upon correspondents in Alabama of members of the New York

Cotton Exchange and Chicago Board of Trade was upheld, because the only business of these correspondents was to receive in Alabama orders from residents of that state, to be transmitted by wire to the brokers at the exchange cities, who executed the orders by making upon the exchange the required contracts with other members there present. This court stated:

> "The appellants are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. * * * For that part of the transactions, merely speculative, and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery, as result in actual delivery of the grain or cotton, the stipulated facts show that when the orders transmitted are received in the foreign state the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers.
>
> These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of pur-

chase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

This court treated that case as involving only contracts for the future delivery of bales of cotton, which do not lose their identity by being mixed or stored in a common mass with other cotton of like grade. The case at bar, therefore, is much stronger because all grain shipped from other states, which is carried into this future trading on the Chicago Board, does completely lose its identity when stored in Chicago elevators, and long before it is in any way connected with this future trading.

The *Ware & Leland* case is cited with approval in

Engel v. *O'Malley*, 219 U. S. 139.

N. Y. Life Ins. Co. v. *Deer Lodge Co.*, 231 U. S. 496, 511.

Other decisions of this court support the principle of the Ware case. Thus in

Hopkins v. *United States*, 171 U. S. 578

(more fully cited on page ... of this brief,) it was held that the business of selling live stock on an exchange by members thereof, who were acting as agents for the owners, was not interstate commerce.

Brown v. *Maryland*, 12 Wheaton, 419.

(the first expression of the original package doctrine) where this court held that the property lost its distinctive character as an import, and also its interstate character if, after being brought into a state, it has "become incorporated and mixed up with the mass of property in the country"; and that doctrine has been applied so as to cause all property brought from one state to another to lose its interstate character in the following cases:

Where a box or case is brought into a state contain-

ing many smaller packages or bottles and these smaller packages or bottles are removed from the case for sale.

May v. *New Orleans*, 178 U. S. 496.
Austin v. *Tennessee*, 179 U. S. 343.
Purity Extract Co. v. *Lynch*, 226 U. S. 192.
Weigle v. *Curtice Bros. Co.*, 248 U. S. 285.

When natural gas is piped from one state to another and there distributed by a local company through its local pipes.

Public Utilities Co. v. *Landon*, 249 U. S. 236.

When moving picture films are brought from other states and unrolled and exhibited to audiences.

Mutual Film Corporation v. *Ohio Industrial Commission*, 236 U. S. 230.

When gasoline is brought into a state in tank cars, from which it is sold in quantities to suit purchasers.

Askren v. *Continental Oil Co.*, 252 U. S. 444.

Now let us consider the grain purchased through this future trading by persons who contemplate *shipping* it beyond the state.

Contracts which by their terms contemplate the shipment of grain across state lines are, of course, interstate commerce. But the purpose or intention of some of the purchasers in this future trading upon this exchange to ship out of the state property they purchase does not make their contracts for future delivery made in these "pits" interstate contracts. And if one such contract is not, a large number of such contracts do not constitute, interstate commerce.

United States v. *E. C. Knight Co.*, 156 U. S. 1, 13.
Coe v. *Errol*, 116 U. S. 517.
New York Central v. *Mohney*, 252 U. S. 152.
Arkadelphia Co. v. *St. Louis Ry. Co.*, 249 U. S. 134, 151.

Bacon v. *Illinois*, 227 U. S. 504, 516.
Merchants Exchange v. *Missouri*, 248 U. S. 365.
Hammer v. *Dagenhart*, 247 U. S. 251.
Crescent Oil Co. v. *State of Mississippi*, decided by this court November 14, 1921.

In the *Arkadelphia case, supra*, the fact that as to 95 percent of the products the parties must have contemplated shipment out of the state was held immaterial. In the *Merchants Exchange case, supra*, it was held that a state statute requiring that all grain should be weighed by state officials did not burden interstate commerce, although the grain in large part was shipped in or out of the state.

It has been urged in the North Dakota case now pending before this court that the foregoing rule should not apply where 90 per cent of the grain raised in North Dakota is purchased by persons who intend to ship it out of the state. If this view shall prevail, it will not take the case at bar out of the general rule above stated, because in more than three-quarters in volume of this future trading, the parties do not make deliveries, and therefore do not contemplate shipments out of the state; and undoubtedly in a substantial part of the balance of those contracts (upon which deliveries do take place) the grain is purchased by or for Illinois millers by speculators who sell the warehouse receipts again, by local warehousemen who purchase the grain to keep it earning storage in their elevators, by local investors who buy "cash" grain and sell it for forward delivery with a view of making a profit out of the prevailing carrying charges, etc.—thus leaving an indefinite but small percentage of this future trading, in which the purchasers buy intending to ship out of the state.

All this future trading, therefore, should be regarded as

intrastate commerce, the regulation of which is not within the commerce power of Congress.

This would nullify, because violative of the Federal Constitution—at least as respects this Board—(1) so much of Sec. 4 (b) as requires members of a board of trade to make and keep memoranda of their sales for future delivery, and exposes such memoranda to the Department of Agriculture or Department of Justice; (2) also so much of Sec. 5 (b) as requires a board of trade to provide for the making, filing and keeping for three years, either by it or its members, of reports and records of all contracts for future delivery, and gives the Secretary of Agriculture and Department of Justice access thereto, and (3) also Sec. 5 (f) so far as it makes obligatory on a board of trade to make effective the orders of the Secretary of Agriculture by depriving persons violating the act of the privilege of making future contracts, (4) also Sec. 9 so far as it authorizes the Secretary of Agriculture to investigate future trading on boards of trade.

Third. Let us consider together the other regulatory provisions of the Act above referred to, which require—Sec. 5 (e)—boards of trade to admit to membership representatives of farmers' organizations and permit "patronage dividends," and require—Sec. 5 (b)— boards of trade to provide that reports and records be made and kept of *cash* transactions, and to prevent false reports affecting prices, or the manipulation or cornering of grain, (Sec. 5 (c) and (d)) and which provide (Section 9) for the investigation by the Secretary of Agriculture of boards of trade as respects their cash transactions.

This presents the question whether what this Board does is interstate commerce, or is merely an aid or facility to commerce, and as such beyond the power of Congress.

We have here a non-profit corporation created by a

state, which does no business itself and whose chief function is to furnish in Chicago an exchange hall where its members individually may conveniently and economically transact business. To that end it provides for the admission as members of only such persons as seem to it to be fit in point of character and financial responsibility, it provides a method by which members, who default on their contracts or otherwise misbehave, may be suspended or expelled, it provides rules respecting the terms of the contracts made by its members in the absence of express stipulations to the contrary, it provides arbitration committees to decide the business disputes of its members, and it promulgates and enforces rules to control the business relations of its members to each other and to the exchange itself.

Should not all these be treated as together constituting an instrumentality, which is but an aid to commerce?

Much the larger part of the trading between members in the exchange hall is so-called future trading, which, as already shown, is not interstate commerce. Another substantial part of the trading in the exchange hall is that of members who, as agents, receive grain on consignment to sell and account for the proceeds or buy grain as agents—which, so far as the business of these agents is concerned, has been held by this court not to be interstate commerce. The bidding for, or offering, grain by letters or telegrams sent by members is in no sense a part of the trading on the exchange. Hence, if any, only a minor part of the total volume of trading on this exchange possesses any of the characteristics of interstate commerce.

From the foregoing facts does not the conclusion arise that the maintaining of this exchange hall—and everything that the Board does in connection therewith—lacks any element of interstate commerce within the definition

that this court has frequently given to that term? Hence, is not Congress without power to regulate this exchange.

Such seems to have been the practical construction of state and federal legislators for more than one hundred years prior to the passage of this Future Trading Act.

The stock brokers organized what is now the New York Stock Exchange as early as 1792, and it became a formal organization in 1817. For many years there have existed in some states, stock, grain, cotton and coffee exchanges. The Chicago Board of Trade was first organized as a voluntary association in 1848.

During all this time the states, in which these exchanges have been located, have enacted numerous laws calculated to suppress or minimize the abuses, which these exchanges inevitably give rise to. Illinois at first prohibited "puts" and "calls" (*Booth* v. *Illinois,* 184 U. S. 425), but later permitted these contracts when not used for gambling purposes. Illinois R. S., Ch. 38, Sec. 130. See *Brodnax* v. *Missouri,* 219 U. S. 285.

During all this time Congress has passed no statute to regulate, under its commerce power, these exchanges. It has imposed a prohibitive tax upon such contracts for the sale of cotton as contain certain objectionable terms, but this statute does not seem to be harmful enough to have invited a contest upon its constitutionality.

In 1892, a bill was introduced in Congress to suppress future trading on the grain exchanges through an exercise of the taxing power, but this bill was defeated. (See page 58 of this brief.)

Hopkins v. *United States,* 171 U. S., 578.

seems to support the view here urged. There the business of members of a live stock exchange, who were engaged in receiving from other states cattle to be sold by them on the exchange for the account of their principals,

was held not with the Sherman Anti-trust Act, because it was not interstate commerce, but a mere aid or facility to commerce. The agent in selling the cattle for their owner simply aided him in finding a market. This court said:

> "They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature. * * *
>
> We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from states different from the one in which the exchange is situated and the sale made."

This being so, how can a corporation, which merely furnishes to traders a *hall,* where they may do this trading, be deemed engaged in interstate commerce? Surely the exchange, which furnishes a hall for the trading, is much farther removed from the trading than are the members who occupy this hall and actually participate as agents in the trading there.

Nathan v. *Louisiana,* 8 How. 73, 80,

where, it was held that a broker, who only bought and sold foreign exchange, was not engaged in interstate commerce, but only "in supplying an instrument of commerce" like a shipbuilder.

The Board of Trade, in furnishing a building where traders meet to make contracts—only a small portion of which relate to grain which has, before the sale on the exchange is made, come across state lines, or is to go across state lines after it reaches the purchaser on the

exchange--seems to have no more connection with interstate commerce than have the owners of the grain-mixing warehouses of Chicago, which store much grain that has come from, or is to go to, other states. Yet it has never been thought that these public warehouses are a part of interstate commerce or anything more than an aid thereto. Indeed, this court in

Munn v. *Illinois*, 94 U.S. at p. 135,

held these elevators not to be a part of interstate commerce, saying:

> "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done."

This is approved in

Covington v. *Kentucky*, 154 U. S. 213.

Other decisions supporting this view are:

Budd v. *New York*, 143 U. S. 517-545,

where a statute of New York prescribing the charges for passing grain through floating and stationary elevators was enforced against one operating a floating elevator,

through which grain was transferred from one vessel to another, and this court held that this instrumentality was not a part of interstate commerce, saying: (page 545.)

> "It operates only within the limits of that State, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn* v. *Illinois*. It is of the same character with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State, and other kindred laws."

This court has also held that:

> "The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse."
>
> *Paul* v. *Virginia*, 8 Wall. 168.
>
> *Hooper* v. *California*, 155 U. S. 648.
>
> *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389.

Again in

Merchants Exchange v. *Missouri*, 248 U. S. 365,

this court held that the board of trade in Saint Louis, in maintaining a bureau for weighing, and in granting weight certificates, and in making charges therefor respecting grain received from, or shipped to, points without the State, was not engaged in interstate commerce, and that a State statute, which displaced such bureau, was not an interference with that commerce. In

Brodnax v. *Missouri*, 219 U. S. 285,

the officers of the Kansas City Board of Trade were indicted under a state statute, which made it unlawful for any person or corporation to keep or cause to be kept within the state any *place*, wherein is permitted the buying and selling for future delivery of grain, etc., on margins when the seller does not cause to be made at the time of sale a complete record of the transaction and affix a stamp thereto. The only place kept by the defendants

was the exchange hall. In overruling the contention that the statute violated the commerce provision of the Constitution, this court said:

> "All that the defendant offered to show in this connection was that a substantial part of the sales referred to were of grain * * * which were at the time of sale in course of transportation as articles of interstate commerce. * * * We add that the indictment deals with the *place* where sales, such as the statute describes, are made, and the offense is complete under the statute, by the keeping of such a place, and that occurs before any question of interstate commerce could arise, so far as this record discloses."

Thus in that case this court seems to hold that statutes relative to the keeping of the place—the exchange room—are exclusively within the police power of the states.

The following cases also support the above contention:

House v. *Mayes*, 219 U. S. 270.
Pittsburgh Co. v. *Louisiana*, 156 U. S. 590.
Blumenstock Bros. v. *Curtis Pub. Co.*, 252 U. S. 436.
Williams v. *Fears*, 179 U. S. 270.
Cargill Co. v. *Minnesota*, 180 U. S. 452, 470.
Ficklen v. *Shelby Co.*, 145 U. S. 1.
U. S. Fidelity Co. v. *Kentucky*, 231 U. S. 394.

It is not here claimed that, if elevator or board of trade does some act, which prejudicially touches, or will interfere with interstate commerce—as was claimed of a rule of this Board in *Board of Trade* v. *United States*, 246 U. S. 231, or if members of an exchange conspire to run a corner "*affecting the entire trade of the country*" in a particular commodity, as in *United States* v. *Patten*, 226 U. S. 525,—Congress may not, as to such encroachments, enact a prohibiting act.

All that we do contend is that—considering together

this Board of Trade and all its activities—the general regulation thereof as respects admissions to membership, commission rates, what, if any, memoranda of contracts should be made, etc., should be held to be a part of intrastate commerce, and within the exclusive power of the state.

As stated in

Hammer v. *Dagenhart*, 247 U. S. 251, 273, 275,

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution. * * *
>
> The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government."

It is therefore submitted that, at least as respects all the regulatory features of this Act referred to on pages 31-33. of this brief, this Act is, as respects this Board, an unconstitutional invasion of the rights of the state to regulate its internal commerce, and it should be adjudged to that extent invalid, unless the Act can, in these particulars, be held to be a proper exercise of the power of Congress to impose taxes.

IV.

THE POWER TO TAX.

It may be helpful here to refer to a few considerations —which in this court have become mere truisms—concerning the original purposes, which the framers of our Constitution had in view in adopting that instrument.

When the states through their representatives convened to frame a constitution, one consolidated govern-

ment of all the states was not their purpose. The states were already organized under governments, which possessed sovereign powers and were competent to regulate their entire internal policy.

The differences in institutions and interests of these different communities made it impracticable to adopt a consolidated government having control of all internal affairs. What the convention sought to do was to single out certain governmental functions, which could not be fully exercised separately by the individual states and to lodge these in a central authority capable of acting for the whole. This contemplated the surrender only of the common interest to a common control, leaving each individual state to shape its own internal policy and therein work out its own destiny in its own way. To this end, the Constitution *enumerated* all the powers intended to be bestowed upon the Federal Government.

When the draft of the Constitution was submitted to the several states for their approval, it met a storm of opposition arising out of the fear that the proposed Constitution would deprive each state of its right to regulate its own internal affairs. To meet this the responsible proponents of the Constitution gave assurances,—without which the Constitution could not have been ratified—that immediately upon its adoption, amendments thereto would be made expressly safeguarding the right of the several states to legislate exclusively on subjects purely intrastate; and this assurance was made good by the adoption of the 10th Amendment declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

Thus the Federal Government became one of delegated powers, by which is meant that each of such powers is bestowed for a certain purpose and may not be ex-

ercised except for such purpose. Thus every power granted by the Constitution, whether express or implied, may only be exercised for the *purpose,* for which it was granted. If this were not so, there would be no limitation whatever upon its exercise; it becomes a mere arbitrary power; and none the less arbitrary where Congress, under the pretext of the exercise of one power that it has, undertakes to exercise a power that it has not.

These principles this court proclaimed in

McCulloch v. *Maryland,* 4 Wheaton 315, 420, 421.

Speaking through Chief Justice Marshall, it said (the italics being ours):

> "*Let the end be legitimate,* let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. * * * Should Congress in the execution of its powers, adopt measures which are prohibited by the Constitution; or *should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to* the Government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." In

Legal Tender cases, 12 Wall. 535,

this court, in re-stating this principle, added, "there must be some relation between the means and the end; some adaptiveness or appropriateness of the laws to carry into execution the power created by the Constitution."

In passing upon state statutes claimed to violate the Federal Constitution this court has frequently looked through the form to the substance, and brushed aside anything in the nature of a subterfuge.

Thus a state may, without encroaching upon the foreign commerce power of Congress, enact a statute, whose

purpose is to prevent the introduction within its limits of persons liable to become public charges, and which requires that masters of vessels, upon arrival, list their passengers and give bonds indemnifying the state against the burden of supporting them. (*City of New York* v. *Miln*, 11 *Peters* 102.)

But it is an invasion of the commerce power of Congress for a state to enact a statute exacting a fixed sum for every passenger landed, whether liable to become a charge or not. (Passengers Cases, 7 Howard 283.)

After these decisions the State of New York attempted by a statute to provide for the giving of bonds of indemnity, but also to allow the masters of vessels, if they chose, to avoid the giving of bonds by paying a fixed charge for each passenger. Out of the fund thus created the state was to be indemnified against the expense of supporting pauper immigrants. This last statute was plainly so framed as to make it preferable for the master to pay the money instead of giving a bond, and it was thus in a *roundabout* way exercising a power, which the state did not possess. This court in

Henderson v. *Mayor*, 92 U. S. 259, 268,

held the act unconstitutional, saying (the italics are ours):

> "In whatever language a statute may be framed its *purpose* must be determined by its *natural and reasonable* effect, and if it is apparent that the *object* of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore," it is a tax on passengers.

Again this court, in considering a statute imposing wharfage fees adhered to the same view in

Morgan v. *Louisiana*, 118 U. S. 455, 462.

> "In all cases of this kind it has been repeatedly held that, when the question is raised whether the

> state statute is a just exercise of state power, *or is intended by a roundabout means to invade the domain of Federl authority*, this court will look into the operation and effect of the act to discern its purpose."

Similar cases are:

Chy Lung v. *Freeman*, 92 U. S. 275.
Cannon v. *New Orleans*, 20 Wall. 577.
Minnesota v. *Barber*, 136 U. S. 313, 320.
Soon Hing v. *Crowley*, 113 U. S. 703, 710.
Mugler v. *Kansas*, 123 U. S. 661.
Loan Association v. *Topeka*, 20 Wall. 655.

This court in many cases has nullified every form of state interference with the powers of Congress over interstate and foreign commerce "no matter how closely allied to powers conceded to be in the states." (*Henderson* v. *Mayor*, 92 U. S. 272.)

It surely will be no less ready to condemn any form of congressional interference with a state's right to regulate its internal commerce, "no matter how closely allied to powers conceded to be" in Congress. If a state statute will be annulled when a mere pretext, or a roundabout way of exercising a power not possessed, then an act of Congress of the same character should be also declared invalid.

This leads us to a consideration of the power of Congress to lay internal taxes.

Immediately following the Declaration of Independence, the colonies had become states and later entered into the Articles of Confederation, under which each state retained "its sovereignty * * * and every power * * * not expressly delegated to the United States in Congress assembled." These Articles conferred on Congress no power to tax. The several states undertook

to supply to a common treasury the necessary funds for the purposes of the Confederation.

Thus each state, before the present Constitution was adopted, possessed the only power to levy taxes, and this power was unlimited except so far as it was restricted by the state's constitution.

When a stronger union was found necessary the proposed Constitution did not seek to confer, and the states were unwilling to give to Congress, the general power to lay internal taxes for every purpose. The Constitution expressly limited the powers to certain purposes—which were necessarily expressed in general terms. It proposed to confer, and its adoption conferred, on Congress the "power to lay and collect taxes, duties, imposts and excises, to pay [for the purpose of paying] the debts and provide [providing] for the common defense and general welfare of the United States."

We are concerned here only with the extent of this power as respects internal taxes.

The protective tariff was then an established governmental system in England and elsewhere, and doubtless the Constitution contemplated that in the laying of *imposts* Congress might fix the duties with a view to excluding importations rather than raising revenue.

But there is no warrant for saying that at that time the power to lay internal taxes had any other legitimate purpose *than the raising of revenue;* or that the states in conferring on the national government a concurrent power to levy taxes, ever contemplated that Congress might exercise that power for any other purpose than to raise revenue.

This, we think, is apparent for this reason:

Under its then existing constitution each state had unlimited power to regulate the commercial and other trans-

actions of its citizens. Resort to a roundabout way of doing this through the levying of taxes was not necessary. This is also true of the governments of Europe. There was nowhere any dual system of government requiring a written constitution to accurately separate and define the powers that belong to each of the separate governments, and hence no occasion or incentive to use the taxing power as a cloak to accomplish something other than getting revenue.

Indeed, does anyone suppose that—considering the pronounced disinclination of the states to surrender their own powers—the Constitution would have been adopted by the requisite number of states, if John Marshall in Virginia and Alexander Hamilton in New York, had responded affirmatively to the question, whether the proper exercise of power to tax thus to be conferred, included also the power to regulate, or to prohibit each state from regulating, its internal trade and other local affairs.

In *McCulloch* v. *Maryland,* 4 Wheaton 317, 431, was presented to this court the questions, whether Congress had power to incorporate, as one of the agencies of the Government, the United States Bank, and this court having decided that it had—whether the State of Maryland could impose a tax upon a branch of that bank located in that state. In deciding that the state statute, in providing such a tax, was an illegal encroachment upon this Federal power, this court (Chief Justice Marshall) made use of the expression, "that the power to tax involves the power to destroy." That was not the question involved in that case. This was only a way of saying that any state taxing-statute might impair the Federal power. It was a mere phrase, used argumentatively and not to *support* a Federal statute, but to *annul* a state statute. In

Veazie Bank v. *Fenno,* 8 Wall. 533

the question arose during the Civil War, whether Congress could impose a 10 per cent tax on the notes of a State bank, and that statute was upheld upon the ground that it was the proper exercise of the power of Congress to provide a circulation of coin and to authorize the emission of letters of credit, although it was also stated—in anwer to the argument that the tax was so excessive as to indicate the purpose of Congress to destroy the bank's franchise—that the court could not pronounce the law unconstitutional for the reason "that the tax was excessive."

With this as a basis, this phrase of Chief Justice Marshall—that the power to tax involves the power to destroy—has now become in the minds of many in and out of Congress a fixed legal maxim, *by which the powers of Congress are to be measured.* Congress now treats it as fully warranting the use of the taxing power to regulate or prohibit whatever it may not otherwise regulate or prohibit.

Indeed, this court having very recently adjudged that Congress had exceeded its commerce power in directly prohibiting child labor, Congress has now endeavored to accompiish the same result under the form of a tax law.

> "Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised at all it must be exercised at the will of those in whose hands it is placed." (*Brown* v. *Maryland*, 12 Wheat. 439.)

If, therefore, Congress is to be given by this court a free hand in enacting such statutes, the right of the states to regulate their internal affairs will henceforth depend entirely on the will of Congress. It may prescribe the kind of fire escapes to be used on hotels and theatres, by taxing such as do not adopt its kind of fire escape. It may regulate the height of city buildings by imposing a pro-

hibitive tax on owners of buildings exceeding its prescribed height. It may deprive owners of grain within a state of the power to insure it by imposing a prohibitive tax on future contracts, through which alone they may thus insure; it may prohibit, or regulate in a drastic manner through the subordinates of a cabinet officer—for cabinet members cannot in person give such service—every commercial exchange or other business in no way engaged in interstate commerce; and in innumerable other ways Congress may nullify the powers expressly reserved to the states by the 10th Amendment to the Constitution.

But Congress has not always thought that the power to tax implied the power to regulate or destroy.

In 1892 a bill passed one House of Congress, commonly known as the "Hatch Anti-Option Bill," which—like the present Act—excepted from its provisions contracts for future delivery of grain when made by farmers. It imposed a tax of 20c a bushel on all other contracts for the future delivery of grain, required every person engaged in the business of making such contracts to take out a license, and required that the terms of all such contracts should be in writing, and be recorded in books. The purpose was, by the size of the tax, to suppress all future trading. But it was defeated in the Senate, largely by the arguments against its constitutionality. One of these was by Senator (afterwards Chief Justice) White, who argued that the bill was "flagrantly unconstitutional legislation." We quote from his speech as follows (Congressional Record, Vol. XXXIII, 6513, 6515, 6516, 6517):

> "This, then, is a bill licensing the Federal government to step over the State line and destroy any contract made within a State between citizens of a State which the Federal government may choose to destroy. * * * If the theory which this bill propounds is true every vestige of State autonomy has been wiped

off, and today instead of having a government of limited and restricted powers, each government moving by the force of constitutional gravity in its own orbit, we stand the most unlimited and arbitrary government on the face of God's earth. * * * Ah, but I am told that this is a taxing law; that it is an exercise of the taxing power. It is a tax that does not tax. I call attention to this distinction. On the very face of the bill not even a pretext of taxation can be found. By the very terms of the bill no tax can result from its provisions. * * *

"Ah, but it is said this is an exercise of the taxing power, and although it is an exercise of the taxing power which does not tax to produce revenue, we will declare in this bill that we propose to tax for revenue, although we do not propose to so do. If we do violate the Constitution in doing this, when it goes to the court of last resort it will not be able to decipher the false purpose of the bill and will therefore hold the bill not to be unconstitutional. Why will the court hold it not to be unconstitutional? Not because it is not unconstitutional, but because we have breathed into this law a living lie, because we will have declared that our purpose is to tax for revenue, when every line and letter of the bill says the bill is not an exercise of the taxing power at all, but an attempt to destroy the very framework of the Constitution by going into the States and doing that which the Federal Government confessedly has no power to do. * * *

"It is perfectly true that in two or three cases the Supreme Court of the United States have said that where on the face of a statute there was the exercise of taxation, as the statute on its face was a taxing statute, the court would not destroy the face of the statute by wiping out the taxing provision in the statute with the sponge of the motives which may have actuated the members who passed it. Is that the case here? Where the face of the statute shows no tax, where the face of the statute itself eliminates all human possibility of the exercise of the taxing power for revenue, then I say the mission of jurisdiction is given to the courts of this land to brush that statute away for its flagrant and open violation of the Constitution. Is this not necessarily true?"

And after pointing out the distinction between imposts and the power to lay down internal taxes, the Senator said:

> "In other words, I contend that where power to destroy exists the use of a wrong instrumentality to do the destruction, may be the abuse of an instrumentality but not an abuse of power, because the power to destroy is vested. But where the power to destroy does not exist, the use of an instrumentality to destroy that which there is no power to destroy is not alone an abuse of the instrumentality, but an usurpation of the power itself. Now, the usurpation of power by Congress not vested by the Constitution in Congress is unconstitutional. This being true, it follows that if the usurpation is clear on the face of the act, if the act itself shows the usurpation, the power exists in the Supreme Court of the United States to prevent the usurpation."

This court has not yet assented to this theory that the taxing power of Congress is unlimited. It has, indeed, held that, where a statute is on its face purely and exclusively a taxing law and the only thing relied on to support the charge that it is a subterfuge or roundabout way of doing something else is the amount of the tax, this court will not question the motive of Congress.

McCray v. *United States*, 195 U. S. 27.

But this court was not yet decided that where, as here, the law does not profess to be solely a taxing measure, but by its title and its terms is also a law regulating something which it is beyond the power of Congress to regulate, the statute must be sustained under the taxing power. To so hold would be to shut one's eyes to the real purpose of the law, when Congress had disclosed that motive and purpose in the terms of the statute.

Indeed, its decisions (already referred to) seem to require this court to deduce from the [redacted] the purpose of Congress, and to annul the law where that purpose is not consistent with the Constitution.

It is here too plain for argument that the *only* real purpose of the Future Trading Act is to regulate the grain exchanges. This is shown, not only by the prohibitive character of the tax, but by all the other provisions of the Act. The power to tax is exercised only, as shown later, to provide a *penalty* for non-compliance with statutory requirements which Congress has no power to impose.

Hence the *tax* of 20 cents a bushel imposed by Section 4 of the Act should be annulled because beyond the taxing power of Congress.

But appellants' contention goes still further. It is that, even if this tax itself be upheld, the regulatory features of the Act should be adjudged void because not within the taxing power of Congress. And for this there seems to be ample warrant in the decisions of this court.

Thus Congress has no right, under its taxing power, to prohibit or create a trade in a state in order to increase its objects of taxation.

United States v. *DeWitt*, 9 Wall. 42.

There Congress, having the power to tax all oils, preferred to tax only certain oils, and in order to increase the quantities of oils of the kind it taxed, it prohibited in the taxing statute the use of certain mixed oils which it did not tax; and this court, in annulling this prohibitive feature of the Act, said:

> "Has Congress power, under the Constitution, to prohibit trade within the limits of a State? * * * But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

> It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. * * *
>
> If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.
>
> This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."

License Tax Cases, 5 Wall. 462,

where in discussing the power of Congress to tax, this court said, "But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it."

The Future Trading Act [redacted]ly creates "contract markets" in order that Congress may—*not* tax—but regulate, future trading thereon.

U. S. v. *Doremus*, 249 U. S. 86-93,

which involved an Act of Congress—the so-called Harrison Narcotic Drug Act. This Act purported to be based on the power of Congress to levy taxes. The District Court held a certain section of the Act unconstitutional for the reason that it was not a revenue measure, but was an invasion of the police power reserved to the states This court said (p. 93) (italics ours):

> "Of course, Congress may not in the exercise of Federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the courts to inquire into that subject. *If the legislation enacted has some reasonable relation to the exercise*

of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."

And a bare majority of the court upheld the section in question, because in their opinion it did "tend to keep the traffic above board and subject to inspection by those authorized to collect the revenue," and they could not agree to the contention that the section in question "can have nothing to do with facilitating the collection of revenue;" while the minority of the court, putting a different construction on the section, held it a mere attempt to invade the police power of the States.

Thus in this recent case this court was unanimous in holding that every provision of the taxing law must have some reasonable relation to the exercise of the taxing authority conferred on Congress, and must tend to facilitate the collection of the revenue. Its members disagreed only as to the application of that principle to the terms of that statute.

That decision alone would seem to require that these regulatory features of The Future Trading Act be held unconstitutional.

Now to apply the foregoing to the case at bar—does any of the regulatory provisions of the Future Trading Act summarized on pp. 31-33 of this brief have any reasonable relation to the tax imposed by that Act? Do they tend to aid in the ascertainment and collection of taxes? Is there any proper relation between these regulations treated as a means, and the end—the collection of the tax? Do they have any adaptiveness or appropriateness to a law which imposes a tax upon future trading by others than members of an exchange? Is the end sought "legitimate," and do these provisions "consist with the letter and spirit of the Constitution"?

None of these regulating provisions relate to persons or transactions subject to the tax imposed by the Act. They apply only to an exchange, which becomes a contract market, and such an exchange and all future contracts of its members are free from the tax.

How can forcing representatives of farmers' organizations into membership in the exchange aid in ascertaining or collecting the tax imposed? The contracts of these associations are expressly exempted from the tax.

In what way does the provision of the Act which breaks down the commission rule of the exchange in favor of farmers' organizations contribute to the collection of the tax? The present commission rule, as modified by the Act, will relate only to transactions which are exempt from this tax.

What possible relation to the collection of the tax have those provisions, which require members of a "contract market" to make such memoranda, and the exchange to make or cause its members to make, such reports and records of their transactions, as the Secretary of Agriculture may prescribe, and expose those memoranda, reports and records to the inspection of the Department of Agriculture? They relate exclusively to transactions which are not taxed, and will in no way aid the Government in discovering transactions which are taxed. As soon as the revenue officers learn that any person is a member of an exchange which has been made a contract market—which he may ascertain by reference to the published membership roll of the exchange—they know that all his transactions, whether made for his own account or as agent for others, are free from the tax. A provision requiring members of an exchange—which had *not* become a "contract market"—to keep records of their transactions might be proper, because thereby revenue officials might ascertain whether any of those trans-

actions were sales for future delivery of grain. But the provisions now under consideration can have no such purpose, and contribute to no such result.

How can the provisions of this Act requiring the exchange to prevent the dissemination of false reports concerning crops, or the manipulation of prices, or the cornering of grain aid in any way the collection of this tax? Such reports, or manipulation, or cornering, might temporarily operate to increase or decrease the number of contracts for future delivery on the "contract market," but as these are untaxed, such reports would not have the slightest effect upon the revenue to be derived from the tax. Even if its purpose or effect were to increase such revenue it would be unconstitutional. *United States* v. *DeWitt, supra.*

What relation to the collection of the tax has the provision of the Act requiring the exchange to enforce any order the Secretary of Agriculture may see fit to make depriving any person of trading privileges? All the transactions which a member of an exchange will thus be prevented from making are in the untaxed class.

Surely Congress has no power to penalize a person, who may have evaded a tax, by depriving him of the privilege of trading on an exchange. Much less may it do so when such person is a member of a "contract market" and is not evading any tax. It may only enforce a taxing statute by providing therein the usual money penalties and punishment.

How is the collection of the tax aided by the provision which enables the Secretary of Agriculture to invade the privacy of the offices of the exchange and its members (when the exchange is a "contract market") for the purpose of ascertaining the facts regarding the operation of boards of trade with a view to publishing the results

of such investigation? Surely such investigations as a taxing law may authorize must be confined to investigations which may lead to the discovery of taxable transactions. They can not cover the transactions of an exchange or its members which are not taxed.

On the face of this Act its purpose is two-fold. (1) It imposes a prohibitive tax on certain transactions. Its purpose was not to tax contracts for future delivery when made by or through a member of an exchange, like this Board, which is "located at a terminal market upon which cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service." This was emphasized by the petition of the Secretary of Agriculture to set aside the temporary restraining order of this court.

(2) Its main purpose is to place all boards of trade under the control of the Secretary of Agriculture, and to open their doors to co-operative associations of farmers under circumstances that would permit them to market their crops on the exchange at cost. So dominant is this purpose that the title of the Act should be read as "An Act taxing contracts for the sale of grain for future delivery, and options for such contracts, *for the purpose of* regulating boards of trade."

If the commerce power of Congress were unlimited, Congress would have incorporated these provisions into a purely regulating statute; and as every statute, to be effective, must contain some provision which will compel obedience to it, such act would have made boards of trade subject to the usual penalties or punishment for non-compliance therewith.

But the commerce power of Congress does not extend to any of the regulating features of this Act. Hence

Congress conceived the novel idea of compelling exchanges to comply with the Act by making *members* of a non-complying exchange subject to a prohibitive tax on their future trading. Thus is presented the first attempt of Congress to escape the limitations imposed by the Constitution by using its taxing power *to provide a penalty*, with which to compel compliance with a statute Congress has no power to pass.

There is here no pretense of raising revenue. A prohibitive tax is laid, which is to operate as a penalty to compel compliance with an unconstitutional law. Could one conceive a plainer "roundabout way" to escape the limitations of the Constitution? Could one devise any more obvious *pretext* for evading its provisions?

In the present Act the misuse of the taxing power is most glaring; for it does not impose a penalty upon boards of trade (whose compliance with the Act is sought) by exempting them from a tax otherwise imposed upon them? It offers to *members* of an exchange exemption from a prohibitive tax in order to force these members to compel compliance by their exchange with these regulatory enactments.

Have we not here reached the limit of subterfuge? How can the citizens of this Republic be expected to respect the Constitution, if such transparent evasions as this receive the sanction of this court?

A recurrence to another principle may be here appropriate. In

Boyd v. *United States*, 116 U. S. 635,
Monongahela Navigation Co. v. *United States*, 148 U. S. 325,

in annulling certain acts of Congress, this court said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in

that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

It is therefore submitted that neither the tax imposed upon future contracts nor these regulating features of this Act can be sustained under the taxing power of Congress.

V.

THE "PUT" AND "CALL" PROVISION.

If Section 3, which imposes a prohibitive tax on "puts" and "calls," were in a statute which professed on its face to be exclusively a taxing statute, the decisions of this court would preclude an attack upon its validity.

But such is not the case here. This statute professes to regulate the transactions of members of an exchange as well as to tax. All the other provisions of the Act are clearly regulatory, and this tax is prohibitive, being more than double the present price of some kinds of grain taxed.

Furthermore, these "puts" and "calls" are clearly intrastate transactions only. (Rec., 8.) The State of Illinois has already legislated respecting them in the following provision (Revised Statutes of Illinois, Chap. 38, Sec. 130):

> "Whoever contracts to have or give to himself, or another, the option to sell or buy at a future time any

grain or other commodity • • • where it is, at the time of making such contract, intended by both parties thereto that the option, whenever exercised, or the contract resulting therefrom, shall be settled, not by receipt or delivery of said property, but by the payment only of difference in prices thereof, or whoever forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than $10 or more than $1,000, or confined in the county jail not exceeding one year, or both.''

Do not the foregoing considerations make inapplicable to Section 3 the decisions of this court that an improper motive of Congress will not be inferred from the size of the tax alone; and do they not warrant a decision that Section 3, as well as the others, must be regarded as regulatory in character and beyond the power of Congress?

In other words, should not all the provisions of this Act be adjudged unconstitutional?

Respectfully submitted,

HENRY S. ROBBINS,
Counsel for Appellants.

APPENDIX.

AN ACT

TAXING CONTRACTS FOR THE SALE OF GRAIN FOR FUTURE DELIVERY, AND OPTIONS FOR SUCH CONTRACTS, AND PROVIDING FOR THE REGULATION OF BOARDS OF TRADE, AND FOR OTHER PURPOSES.

This act shall be known by the short title of "The Future Trading Act."

Sec. 2. That for the purposes of this act "contract of sale" shall be held to include sales, agreements of sale and agreements to sell. That the word "person" shall be construed to import the plural or singular and shall include individuals, associations, partnerships, corporations and trusts. That the word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax, and sorghum. The term "future delivery," as used herein, shall not include any sale of cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

Sec. 3. That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents

per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as "privileges," "bids," "offers," "puts and calls," "indemnities,' or "ups and downs."

Sec. 4. That in addition to the taxes now imposed by law there is hereby levied a tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery except—

(a) Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is grower thereof, or in case either party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners or growers of grain, or of such owners or renters of land; or

(b) Where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided, and if such contract is evidenced by a memorandum in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery, and provided that each board member shall keep such memorandum for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice.

Sec. 5. That the Secretary of Agriculture is hereby authorized and directed to designate boards of trade as

"contract markets" when, and only when, such boards of trade comply with the following conditions and requirements:

(a) When located at a terminal market upon which cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service.

(b) When the governing board thereof provides for the making and filing, by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consumed at, on, or in a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated at, on, or in a board of trade, such record to be in permanent form, showing the parties to all such transactions, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof prevents the dissemination, by the board or any member thereof, of false, misleading, or inaccurate report, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

(d) When the governing board thereof provides for the prevention of manipulation of prices, or the cornering of any grain, by the dealers or operators upon such board.

(e) When the governing board thereof admits to membership thereof and all privileges thereon on such boards of trade any duly authorized representative of any lawfully formed and conducted co-operative associations of producers having adequate financial responsibility: *Provided,* That no rule of a contract market against rebating commissions shall apply to the distribution of earnings among the bona fide members of any such co-operative association.

(f) When the governing board shall provide for making effective the final orders or decisions entered pursuant to the provisions of paragraph (b) section 6 of this act.

Sec. 6. That any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

(a) A commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney-General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with the above requirements or is not enforcing its rules of gov-

ernment made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided,* That such suspension or revocation shall be final and conclusive unless within 15 days after such suspension or revocation by the said commission such board of trade appeals to the Circuit Court of Appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such a board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the Circuit Court of Appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the Circuit Court of Appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such

board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided further,* That if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described therein, consisting of the Secretary of Agriculture, the Secretary of Commerce and the Attorney-General of the United States, with the right to appeal as provided for in other cases in this section, the decision on such appeal to be final and binding on all parties interested.

(b) That if the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the said commission refuse all trading privileges thereon to such person. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the said commission, or before a referee designated by the Secretary of Agriculture, who shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture as chairman of the said commission. That for the purpose of securing effective enforcement of the provisions of this act the provisions, including penalties, of section 12 of the interstate commerce act, as amended, relating to the attendance and

testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, or said referee in proceedings under this act, and to persons subject to its provisions. Upon evidence received the said commission may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in said order. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States Circuit Court of Appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its chairman, or to any member thereof, and thereupon the commission shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the commission, and the findings of the commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. In proceedings under paragraphs (a) and (b) the judgment and decree of the court shall be final except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

Sec. 7. That the tax provided for herein shall be paid by the seller, and such tax shall be collected either by the affixing of stamps or by such other method as may have

been prescribed by the Secretary of the Treasury by regulations, and such regulations shall be published at such times and in such manner as shall be determined by the Secretary of the Treasury.

Sec. 8. That any board of trade that has been designated a contract market, in the manner herein provided, may have such designation vacated and set aside by giving notice in writing to the Secretary of Agriculture requesting that its designation as a contract market be vacated, which notice shall be served at least 90 days prior to the date named therein, as the date when the vacation of designation shall take effect. Upon receipt of such notice the Secretary of Agriculture shall forthwith order the vacation of the designation of such board of trade as a contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and his order to all other contract markets. From and after the date upon which the vacation became effective, the said board of trade can thereafter be designated again a contract market by making application to the Secretary of Agriculture in the manner herein provided for an original application.

Sec. 9. That the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade and may publish from time to time, in his discretion, the result of such investigation, and such statistical information gathered therefrom, as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person, and trade secrets or names of customers: *Provided*, That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary, relative to the conduct of any board of trade, or of the transactions of any per-

son found guilty of violating the provisions of this act under the proceedings prescribed in section 6 of this act: *Provided further*, That the Secretary of Agriculture in any report may include the facts as to any actual transaction. The Secretaryof Agriculture, upon his own initiative or in co-operation with existing governmental agencies, shall investigate marketing conditions of grain and grain products, and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such methods as he may deem most effective, information respecting the grain markets, together with information on supply, demand, prices, and other conditions, in this and other countries that affect the markets.

Sec. 10. That any person who shall fail to evidence any such contract by a memorandum in writing, or to keep the record, or make a report, or who shall fail to pay the tax, as provided in sections 4 and 5 hereof, or who shall fail to pay the tax required in section 3 hereof, shall pay in addition to the tax a penalty equal to 50 per cent of the tax levied against him under this act and shall be guilty of a misdemeanor, and upon conviction thereof be fined not more than $10,000 or imprisonment for not more than one year, or both, together with the costs of prosecution.

Sec. 11. That if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Sec. 12. That no tax shall be imposed by this act within four months after its passage, and no fine, imprisonment

or other penalty shall be enforced for any violation of this act occurring within four months after its passage.

Sec. 13. The Secretary of Agriculture may co-operate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employes, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this act in the District of Columbia and elsewhere, and there is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.

Approved August 24, 1921.

No. 616.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

PEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AMEND AN ORDER ENTERED NOVEMBER 21, 1921.

HENRY S. ROBBINS,
Counsel for Appellants.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' SUGGESTIONS IN SUPPORT OF THEIR MOTION TO AMEND THE ORDER ENTERED NOVEMBER 21, 1921.

The remaining part of this order as entered is as follows:

> "It is ordered, the appellees not objecting, That the Board of Trade of the City of Chicago and its directors, appellees, are restrained from seeking or accepting from the Secretary of Agriculture a designation of said Board of Trade as a 'contract market' under the Act of Congress approved August 24, 1921, entitled 'The Future Trading Act,' or from admitting to membership in said Board any representative of any co-operative association of producers as required by said Act; or from modifying its rules or by-laws, as required by said Future Trading Act, in order to entitle said Board of Trade to be designated as a 'contract market;' and from otherwise complying with the terms of said Act prior to the final judgment of the court herein."

The purpose of the original motion was to preserve the *status quo* until the decision of this court upon the validity of The Future Trading Act. In granting the motion this court recognized its power to preserve this status. Such power belongs to every appellate tribunal. (See appellants' brief on the original motion.) It includes the power to make *any* order necessary to preserve, until the final decision, the condition existing when the order is made.

The order, if amended as here asked, will do this. *The present order does not.* At the present time every member of the Board of Trade may sell grain for future delivery without paying any tax thereon. If the present order is not amended, these members after December 24, 1921—when The Future Trading Act goes into effect—must either stop making any sales for future delivery or subject themselves to a tax of 20 cents a bushel on such sales, or to the heavy penalties of the Act, during the pendency of this appeal, if the Act shall be adjudged valid. In either event, the existing status does not continue until the final decision of this court. The right to continue making sales for future delivery free from any contingent liability does not continue during the pendency of the appeal. The order as now entered only restrains the Secretary of Agriculture and the other officials from collecting from appellants *during the pendency of this appeal* and 20 days after final judgment herein, any tax or penalty accruing under such Act.

As the order now stands, the Board of Trade is restrained from becoming a "contract market" which to that extent properly preserves the present status. But in doing this the order disturbs the status as to members of this exchange, who must either cease trading or continue trading under a contingent liability for extremely heavy taxes and penalties. The only safe course

for these members to adopt will be to cease all future trading on this important exchange, and this doubtless will result in a great disturbance of the grain trade of the country.

The Future Trading Act does not contemplate making members of the principal exchanges pay any tax upon their sales for future delivery. But for the order of this court restraining the Board from becoming a "contract market" it would become a "contract market" and then no member of this Board could become liable for any tax imposed by the Act. Hence the amendment proposed will not deprive the Government of any revenue.

Indeed, the restraining order which the amendment seeks against the collection of any tax or penalty accruing while the case is before this court, is a mere incident, and a necessary incident, to the order entered by this court restraining this Board from yielding to the compulsion of this statute before its constitutionality has been passed upon by this court.

The only effect of the order, if amended, would be to provide effectively that this Future Trading Act shall not become operative as against members of the Chicago Board of Trade until this court has decided upon its constitutionality.

HENRY S. ROBBINS,
Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION.

To Appellees in the Above Entitled Cause and Their Counsel:

Please take notice that on Monday, the 5th day of December, 1921, at 12 o'clock M., or as soon thereafter as counsel can be heard, we shall present to the court a motion to amend the order entered in the above entitled cause on the 21st day of November, 1921, a copy of

which motion and suggestions in support thereof is herewith served upon you.

HENRY S. ROBBINS,
Counsel for Appellants.

Received a copy of the above notice, motion and suggestions in support thereof, this ..... day of December, 1921.

.....
Counsel for Certain Appellees.

.....

.....

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AMEND ORDER ENTERED IN THE ABOVE ENTITLED CAUSE ON NOVEMBER 21, 1921.

Now come John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser and Alonzo B. Lord, appellants in the above entitled cause, by Henry S. Robbins, their counsel, and move the court:

To amend the order entered in the above entitled cause on the 21st day of November, 1921, by striking out therefrom the following clause:

> "Also, that *during the pendency of said cause in this court and for twenty* (20) *days after final judgment herein,* the appellees, Henry C. Wallace, Secre-

tary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, and each of their successors in office, are restrained from collecting, or attempting to collect, by suit, criminal prosecution or otherwise, from appellants, or any other members of said Board of Trade, any tax or penalty which may have accrued or been incurred under said Future Trading Act, or from taking, during said period, any other steps against said Board of Trade or any of its members to enforce, or compel their compliance with, or punish for non-compliance with, any of the provisions of said Trading Act."

and inserting in lieu thereof:

"Also, the appellees, Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois, and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, and each of their successors in office, are restrained from collecting, or attempting to collect, by suit, criminal prosecution or otherwise, from appellants or any other member of said Board of Trade, any tax or penalty which may have accrued, or been incurred under said Future Trading Act, *during the pendency of said cause in this court and for twenty days after final judgment herein,* or from taking during said period any other steps against said Board of Trade or any of its members to enforce or compel their compliance, or punish for non-compliance, with any of the provisions of said Future Trading Act."

The order is in the terms of the motion therefor, except that the italicized words were transposed. This motion to amend only seeks a change in the location of these words.

The grounds for said motion are stated in the accom-

panying suggestions, which also set out the remaining part of the order as entered.

JOHN HILL, JR., *et al.*,
Appellants.

By HENRY S. ROBBINS,
Their Counsel.

No. 616.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO ADVANCE AND FOR AN ORDER PRESERVING THE STATUS QUO, AND BRIEF IN SUPPORT THEREOF.

HENRY S. ROBBINS,
Counsel for Appellants.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

To Appellees in the above entitled Cause and their Counsel:

Please take notice that on the ...15th..... day of November, 1921, at 12 o'clock m., or as soon thereafter as counsel can be heard, we shall present to the court a motion to advance and for an order preserving the *status quo*, a copy of which motion and a brief in support thereof is hereto attached and served upon you.

HENRY S. ROBBINS,
Counsel for Appellants.

Received a copy of the above notice, motion and brief this.....day of November, 1921.

.....
Counsel for Certain Appellees.

.....

.....

.....

I am authorized by the Solicitor General to say that he concurs in the motion to advance. He also joins me in the suggestion that, if agreeable to the Court, it will suit the convenience of both counsel not to have the case set before the 1st of February.

HENRY S. ROBBINS

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO ADVANCE AND FOR AN ORDER PRESERVING THE STATUS QUO.

Now come John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, appellants in the above entitled cause, by Henry S. Robbins, their counsel, and move the court:

(1) To advance said cause and set the same down for an early hearing, and

(2) For an order preserving the *status quo* while this cause is pending in this court, by restraining appellees, Board of Trade of the City of Chicago and its directors, from seeking or accepting from said Secretary of Agriculture prior to the final decision of this court a designation of said Board as a "contract market" under The Future Trading Act, or from admitting to membership

in said Board, prior to said decision, any representative of any co-operative association of producers as required by said Act; or from modifying, prior to said decision, its rules or by-laws, as required by said Future Trading Act, in order to entitle said Board of Trade to be designated as a "contract market"; and from otherwise complying with the terms of said Act prior to said decision, and also restraining appellees, Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, and each of their successors in office, from at any time hereafter collecting or attempting to collect, by suit, criminal prosecution or otherwise, from appellants, or any other member of said Board of Trade, any tax or penalty which may have accrued or been incurred under said Future Trading Act while this cause is pending in this court and for twenty (20) days after its final decision, and also from taking during said period of time last mentioned any other steps against said Board of Trade or any of its members to enforce, or compel their compliance with, or punish for non-compliance with, any of the provisions of said Trading Act.

The reasons for thus preserving the *status quo* are that this would not impose any pecuniary loss upon the Government or prejudicially affect the public, and that in the absence of such order appellants would not fully benefit by a decision of this appeal in their favor.

These reasons are amplified in the brief hereto attached.

JOHN HILL, JR., *et al.*,
Appellants.

By HENRY S. ROBBINS,
Their Counsel.

BRIEF FOR APPELLANTS IN SUPPORT OF THEIR MOTION TO ADVANCE AND FOR AN ORDER MAINTAINING THE STATUS QUO.

This is an appeal from an order dismissing for want of equity a bill filed by appellants in behalf of all the members of the Chicago Board of Trade against that exchange and its directors and also the Secretary of Agriculture, the Commissioner of Internal Revenue, the U. S. District Attorney at Chicago and the Collector of Internal Revenue for that district, to enjoin compliance by said Board of Trade and its directors with the recent Act of Congress entitled, "The Future Trading Act," and the enforcement of that act by the other appellees.

Upon the filing of the bill the District Court entered a rule to show cause why a temporary injunction should not issue and also restraining appellees from complying with or enforcing compliance with said act before the hearing of such application for an injunction.

Some appellees filed motions to dismiss for want of equity and on the return of the rule to show cause the District Court dismissed the bill for want of equity.

The sole purpose of the bill being to have The Future Trading Act declared unconstitutional, the District Court allowed an appeal to this court and directed that the existing temporary restraining order continue in force until this court should act upon appellants' application for a continuance of such order, provided such application should be made by November 21, 1921.

The importance to the public (as well as to the grain exchanges) of an early decision on the validity of this

statute is so apparent that nothing need be said upon that part of the motion, which seeks to have the case advanced. Indeed, we believe that the Government will concur in the request for an early hearing.

We confine ourselves, therefore, to presenting the reasons why the *status quo* should be preserved pending the hearing in this court.

That this court has ample jurisdiction to preserve the *status quo*—as contemplated by this motion—to the end that the parties may have the full and complete relief which they are entitled to receive from this court, is no longer an open question.

> *Omaha St. Rwy. Co.* v. *Interstate Com. Com.*, 222 U. S. 582, and cases cited.

As stated by this court (247 U. S. 220):

> "The present status should be maintained until such time as the court may consider all of the grave questions of laws * * * connected with this complicated and important litigation."

This Act is entitled, "An Act taxing contracts for the sale of grain for future delivery and options for such contracts and providing for the regulation of Boards of Trade, and for other purposes."

Thus the purpose of the Act is two-fold:

First. To impose a tax of 20 cents a bushel on the following transactions:

(a) Uni-lateral contracts for grain, commonly known as "puts and calls." (Sec. 4.)

(*b*) All contracts for future delivery of grain *not* made—

1—either by the present owner or grower of grain, or associations of such owners or growers;

2—or by or through a member of one of the principal grain exchanges—that is, exchanges having recognized official weighing and inspection service, and

upon which cash grain is sold in sufficient volume to reflect the general value of grain. Such exchanges are to be designated as "contract markets" by the Secretary of Agriculture. (See sub-clause (a) of Section 5 of the Act.)

Second. The other purpose is to regulate these designated grain exchanges and their members in the following respects:

(1) The special charter granted by the State of Illinois to the Chicago Board of Trade confers on it the power to admit such members "as it may see fit" and the Illinois courts refuse to interfere with the exercise of this power. Sub-clause (E) of Section 5 of the Future Trading Act *compels* this exchange (and others) to admit to membership any duly authorized representative of any co-operative association of producers.

(2) Again, the charter of this Board authorizes it to make such rules and by-laws for the management of the business of its members "as it may think proper," and under this power the Board has for many years maintained a rule requiring its members to charge their principals certain minimum rates of commission; and the Illinois courts hold such rule to be valid. The Future Trading Act breaks down this rule, as to farmers' co-operative associations, by requiring exchanges to sanction so-called "patronage dividends," whereby the representative of a farmers' co-operative organization admitted to membership may rebate all commissions earned by him at the regular rates back to the members of the co-operative association on the basis of the quantity of grain sold by each member through such representative, thus enabling these organizations to transact business on the exchanges at *cost*. The result of this will be to much impair, if not ultimately to destroy—the value of memberships in this exchange, which are now worth about $7,000.

(3) The Act also requires every member of an exchange making contracts for future delivery to evidence such trades by detailed memoranda in writing, and to preserve these memoranda for three

years or longer, if the Secretary of Agriculture so directs.

(4) The Act also requires each exchange to provide for making and filing, either by the Board or its members of *reports*, in the form to be prescribed by the Secretary of Agriculture, showing the details of all transactions entered into and also for the keeping of *records* showing the details of all such transactions in a manner to be prescribed by the Secretary of Agriculture and for the period of three years.

(5) The Act also authorizes the Secretary of Agriculture to deprive any member of an exchange, or other person, of the right to make contracts for future delivery if he shall violate the terms of the Act, and also requires the exchange to deny to any member or other person the privilege of trading on the exchange during the time he shall be deprived of that privilege by the Secretary of Agriculture.

A fine of not more than $10,000, or imprisonment for not more than one year, or both, is the punishment prescribed for any person violating the provisions of the Act; but this does not apply to the boards of trade.

Compliance with the Act by the boards of trade is enforced by providing that the members of such exchanges as shall be designated as "contract markets" shall be exempt from the tax, and the Secretary of Agriculture is directed to recognize as "contract markets" only such exchanges as comply, and continue to comply, with the provisions of the Act.

The Act was approved August 24, 1921, but it provides that no tax shall be imposed and no penalty be enforced for any violation of the Act, *occurring within four months after its passage*. Thus by the terms of the Act it becomes operative on the 24th of December, 1921.

I.

Contracts for future delivery of grain must, by the rules of the Board of Trade, be made—and they are in fact made—only in its exchange room between certain

market hours, and only between members of the Board there present.

More than three-quarters of those contracts are settled by offsetting other like counter-contracts made between members in the exchange room, and the balance of said contracts are performed by actual delivery; but this delivery in all cases is required by the rules of the Board to be, and is, by the delivery of warehouse receipts issued by the grain-mixing public warehouses of Chicago, which under a statute of Illinois are required to mix immediately all grain tendered for storage with other grain already in store of like grade, and to state on their receipts the fact that the grain covered by the receipt is so mixed; and when the receipts are tendered to obtain the grain this statute also requires the warehouseman to deliver such of the grain in his warehouse of the grade called for by the receipt, *as has been longest in store.*

Thus all grain coming to Chicago from other states and going into elevators at once loses its identity, and becomes an unidentified part of the common mass of the property in the state.

All these contracts for future delivery contemplate only the delivery of warehouse receipts, upon which holders will get only the required number of bushels of the proper grade out of a common mass of grain in the elevator, the component parts of which, if from other states, have completely lost their interstate character. (See Record pp. .....)

That this future trading is in no sense interstate commerce seems to have been settled by this court in

Ware & Leland v. *The Mobile Co.*, 209 U. S. 405. That case involved future contracts made upon the New York Cotton Exchange for the delivery of bales of cotton, which continued to preserve their identity. The

present case becomes still stronger because shipments of grain from other states *do* lose their identity when stored in the Chicago elevators.

II.

Nor can the provisions of The Future Trading Act above referred to, which compel the exchanges to admit to membership representatives of farmers' co-operative associations, which break down the commission rule of this exchange, and require the exchanges and their members to make and preserve memoranda, reports and records of their transactions, be sustained under the taxing power of Congress.

This court has held that provisions claimed to be in the exercise of the taxing power must have some reasonable—and not merely remote—relation to the exercise of the taxing authority conferred by the Constitution.

U. S. v. *Doremus*, 249 U. S. 86, 93.
U. S. v. *DeWitt*, 9 Wall. 41-44.

None of these foregoing provisions relate to persons or transactions subject to the tax imposed by the Act. Both the exchange and all the future contracts of its members are exempt from the tax. How then can forcing unacceptable persons into membership in the exchange, or breaking down the commission rule of the exchange, or compelling the exchange or its members to make or keep memoranda, reports or records of transactions not taxed, contribute in the slightest degree to the imposition, ascertainment or collection of a tax on contracts of persons, who are not members of the exchange?

Thus it seems that these provisions of The Future Trading Act, so far as they concern the Chicago Board

of Trade and its members, can be sustained neither under the taxing, nor the commerce, power of Congress.

Nor does R. S., Section 3224—which prohibits suits to enjoin the collection of taxes—have any application here. That section is not of universal application; it has its exceptions.

> *Pacific Whaling Co.* v. *U. S.*, 187 U. S. 449-452.
> *Dodge* v. *Osgood*, 240 U. S. 118, 122.

Section 3224 is to be considered with reference to the purpose of its enactment. This was to avoid having the revenue of the Government tied up by injunction suits, another remedy being provided by statute through a suit by the taxpayer to recover after he has paid his tax under protest. But appellants can not test the constitutionality of this Future Trading Act by paying the tax under protest and then suing to recover; for, unless restrained, the Board of Trade, under the compulsion of this Future Trading Act, will accept designation as a "contract market," and as soon as it does so, the contracts for future delivery of these appellants will be exempt from the tax imposed by the Act. They could not then pay, because the Collector of Internal Revenue would not accept from them any tax; nor could they claim to have paid under protest, if they paid a tax not exacted from them.

Again, the purpose of Section 3224 is to prevent the withholding of the tax when due and the consequent embarrassment to the Government from a delayed revenue. But the Government will never get one dollar from this 20 cents per bushel tax imposed upon future trading. With wheat now selling in the market at $1.00 a bushel and corn at 46c a bushel and oats at 31c a bushel (Rec., ...), no person can afford to make, and pay the tax upon, a single contract for future delivery of grain. The tax is,

and is intended to be, a prohibitive one, and will never produce one dollar of revenue; hence the reason for Section 3224 here fails. The other statutory remedy is not available to these appellants, and they have no remedy except by bill and injunction.

The purpose of Section 3224 would not be defeated by enjoining these officials from collecting any tax or penalty under this Act from the members of this Board of Trade until the constitutionality of this Act shall be determined.

Indeed, the injunction against the collection of any tax or penalty or punishment while the case is before this court is a mere incident, and a necessary incident, to an order restraining this Board of Trade from yielding to the compulsion of this statute before its constitutionality has been passed upon by this court.

Indeed, no order should be entered restraining the Board of Trade from becoming a "contract market," unless the court shall also restrain these officials, and their successors, from collecting from any member of this Board of Trade any tax or penalty, or proceeding criminally against any such member for any act or omission, *which shall accrue or be incurred during the pendency of this appeal in this court and at least twenty days thereafter,* this twenty days being necessary to afford time to this exchange to qualify as a contract market, should the decision of this court uphold the statute.

For if without this clause the Board of Trade shall be enjoined from becoming a "contract market," every member of the Board making a contract for future delivery while this case is pending in this court would be confronted with the alternative of either becoming contingently liable to pay these prohibitive taxes, or of not making any contracts for future delivery at all, during

the pendency of this appeal—and the latter would be the only safe course for all members of this exchange to adopt—with the result that all future trading on this exchange—the largest grain market in the world—would be temporarily abandoned, and the grain trade of the country would be thrown into great confusion, followed doubtless by many business failures.

Indeed, the only effect of ~~such an~~ the order would be to provide that this Future Trading Act shall not become operative, as against the members of the Chicago Board of Trade, until this court shall have decided upon its constitutionality.

That the public will not suffer by this short suspension of the Act, as respects this one exchange, is evidenced from the fact that this exchange and its future trading have been existent for more than seventy years without the necessity of any congressional regulation, and Congress, itself, postponed the operation of the present Act for four months after its passage.

It is therefore respectfully submitted that the *status quo* should be preserved by a restraining order in the terms specified in the motion here submitted.

HENRY S. ROBBINS,
Counsel for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

JOHN HILL, JR., ET AL., APPELLANTS,
v.
HENRY C. WALLACE, SECRETARY OF AGRICULTURE, ET AL., APPELLEES.
No. 616.

MOTION.

Comes now the Solicitor General and, on the petition of Henry C. Wallace, Secretary of Agriculture, filed herewith and made a part hereof, moves the court to vacate the order entered herein on November 21, 1921, and without prejudice to the rights of any of the parties, to substitute in lieu thereof an order in accordance with the prayer of said petition.

JAMES M. BECK,
Solicitor General.

78819—21

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

JOHN HILL, JR., ET AL., APPELLANTS,
v.
HENRY C. WALLACE, SECRETARY OF AGRICULTURE, ET AL., APPELLEES.
No. 616.

PETITION OF HENRY C. WALLACE, SECRETARY OF AGRICULTURE, TO MODIFY ORDER ENTERED IN THE ABOVE-ENTITLED CAUSE ON NOVEMBER 21, 1921.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows to this honorable court as follows:

1. That he is Secretary of Agriculture, one of the appellees herein.

2. That he was not served with notice of appellants' application to the court for the order entered in this suit on November 21, 1921, and had no opportunity prior to the entry of said order to submit to the court the considerations now in this petition set forth.

3. That if said order stands in full force and effect according to its tenor, great and irreparable injury

will result to the persons and under the circumstances following.

4. That the Chicago Board of Trade has a membership of about sixteen hundred and twenty (1,620) persons, of whom the appellants constitute only a minority, and that said board of trade, your petitioner is informed and verily believes, desires, through its properly constituted officers, to apply to your petitioner, the Secretary of Agriculture, for designation as a contract market in accordance with the provisions of the future trading act, in order that its members may continue in future trading in grain on said board and thereby avoid the payment of the taxes imposed by said act on contracts for future delivery of grain not made on a board of trade designated by said Secretary as a contract market.

5. That under said order, if the court finally holds the future trading act valid, any member of said Chicago Board of Trade who deals in future contracts for grain on said board during the period covered by said order will be liable after the expiration of said order for the payment to the United States of the tax of twenty (20) cents a bushel levied by the future trading act upon every bushel of grain involved in such dealings, because said order restrains the Secretary of Agriculture, during said period, from designating said board as a contract market, and under the future trading act all future trading in grain is subject to said tax unless made by or through a member of a board of trade so designated or unless

such trading is carried on under certain other conditions which may not obtain in the bulk of the transactions as ordinarily conducted on said board.

6. That your petitioner is informed and believes that the possibility of having to pay said tax may result in complete and abrupt cessation of future trading in grain on said board during said period because such trading normally is continuous, the volume of transactions is great and said tax is substantial in comparison with price fluctuations in grain, as alleged in the bill of complaint herein, and may therefore cause other members of said board, as well as the appellants herein, to feel that, as alleged in the bill of complaint, they can not afford to deal in future contracts in grain while their liability for the payment of said tax is uncertain.

7. That said board of trade is the leading grain exchange in the United States and your petitioner is fearful that sudden and abrupt cessation of future trading in grain thereon might result in serious inconvenience and perhaps great losses, not only to the members of said board of trade but also to the grain growers of the United States and to other persons using grain in their business, such, for instance, as millers and feeders of live stock, who depend upon and utilize the hedging facilities afforded by said board of trade to insure them against losses and to enable them, as they claim, to sell their products to the ultimate consumer on a much narrower margin of profit than they would otherwise be able to do, so that ultimately such sudden

and abrupt cessation of trade might affect all of the people in the United States, or at least a great percentage thereof, adversely.

8. That the injury which may thus be wrought upon the membership of said Chicago Board of Trade who are not complainants in this suit, as well as upon the public generally, and which board of trade, as aforesaid, desires that it be designated by your petitioner as a contract market, would be out of all proportion to the injury which possibly could be inflicted upon the appellants by vacating the order of November 21, 1921, and granting the relief herein prayed for, since it appears from the bill of complaint in this suit that the only substantial injury, if any, that might be suffered by the appellants, pendente lite, would be through the admission to membership on said board of trade of the representatives of cooperative associations against which possible injury the appellants would be fully protected by the granting of the relief herein prayed

The premises considered, your petitioner, appearing solely for the purposes of this petition and for other, respectfully prays:

That the order of November 21, 1921, aforesaid, vacated, and, with a view to preserving, pendente lite the interests of all parties to the suit and otherwise there be substituted in lieu thereof an order—

(*a*) Restraining until twenty (20) days after final judgment herein the Board of Trade of the city of Chicago and its officers and direc-

tors from admitting to membership thereof and privileges thereon any representative of any cooperative association of producers not otherwise admissible to membership by virtue of the rules of said board of trade in effect prior to the institution of this suit, and from making and filing for or requiring appellants to make and file any report required by any rule or regulation issued by the Secretary of Agriculture under the future trading act.

(*b*) Restraining during said period the said Henry C. Wallace, Secretary of Agriculture, from refusing to designate said board of trade as a contract market under the future trading act solely because of the refusal of said board of trade to admit to membership thereof and privileges thereon any representative of any cooperative association of producers not otherwise admissible to membership by virtue of the rules of said board of trade in effect prior to the institution of this suit, and from enforcing during said period any rule or regulation issued by the Secretary of Agriculture under the future trading act by which appellants, or said board of trade for them, would be required to make and file reports with the Secretary of Agriculture.

2. And for such other, different, or further relief in the premises as to this honorable court may seem appropriate.

HENRY C. WALLACE,
Secretary of Agriculture, Petitioner.
JAMES M. BECK,
Solicitor General.

CITY OF WASHINGTON,
District of Columbia, ss:

Henry C. Wallace, being duly sworn, deposes and says: That he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his information and belief.

HENRY C. WALLACE.

Subscribed and sworn to before me, at Washington, D. C., this third day of December, 1921.

[SEAL.] JAMES B. HORIGAN,
Notary Public in and for the District of Columbia.